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Wisconsin. Supreme Court

WISCONSIN REPORTS

159

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

NOVEMBER 17, 1914 — FEBRUARY 9, 1915

FREDERIC K. CONOVER
OFFICIAL REPORTER

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

JOHN B. WINSLOW
Ex officio CHIEF JUSTICE
ROUJET D. MARSHALL
ROBERT G. SIEBECKER
JAMES C. KERWIN
WILLIAM H. TIMLIN
JOHN BARNES
AAD J. VINJE

Attorney General - - WALTER C. OWEN

Clerk - - - CLARENCE KELLOGG

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MEMORANDUM.

Mr. Justice TIMLIN took no part in the decision of the cases reported in this volume on pages 539 to 655 inclusive.

ERRATUM.

158 Wis. 505, line 17. For north to south, read south to north.

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IN MEMORIAM.

EGBERT B. BUNDY.

On the 17th day of November, 1914, Mr. John B. Sanborn of Madison presented to the court the following

Memorial of the Bar of the Eighth Judicial Circuit.

Judge EGBERT BIRD BUNDY was born at Windsor, Broome county, New York, on the 8th day of February, 1833, and died at Menomonie, Dunn county, Wisconsin, on the 29th day of September, 1904.

At the first term of the circuit court for Dunn county succeeding his death, a memorial and resolutions of the bar of that county were presented and spread upon the records of the court. One of these resolutions was as follows:

"Resolved, that in the death of Honorable E. B. BUNDY the legal profession has been deprived of one of its oldest and most distinguished members, the state and community of an honored pioneer citizen, and his bereaved family of a loving, devoted, Christian husband and father."

In December, 1913, a bar association for the Eighth judicial circuit was organized at Menomonie. This association at its first meeting passed a resolution to the effect that a memorial of Judge BUNDY should be presented to this court and the undersigned were appointed a committee to draft and present such memorial.

Judge BUNDY was the son of Oliver T. and Lydia Smith Bundy, whose ancestors for several generations were natives of Connecticut. Oliver T. Bundy was a physician and practiced his profession for many years in Windsor, New York.

Judge BUNDY received his education in the common schools of Windsor and at Windsor Academy. After leaving school he studied law in a law office at Deposit, New York, and was admitted to the bar in Cortland, New York, at the general term of the Supreme Court in 1856. In 1857 he came to Wisconsin and opened a law office in Dunnville, then the county seat of Dunn county. Later, upon the removal of the county seat to Menomonie, he became a resident of that city and thenceforward continued to reside there until the time of his death, with the exception of a brief interval in the early 70's during which he resided successively at Wabasha, Minnesota, and at Durand, Wisconsin. Commencing the practice of his profession in what was then a comparatively new and sparsely settled country, he continued it steadily until 1877, meanwhile serving one term as county judge of

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Egbert B. Bundy.

Dunn county. In April, 1877, he was elected judge of the Eighth judicial circuit to fill a vacancy and was thereafter re-elected for the three next succeeding full terms, in all a period of nearly twenty years, his last term ending on the first Monday in January, 1897.

In 1861 Judge BUNDY was married to Miss Reubena Macaulay, and to them were born nine children. Three of his sons entered the legal profession. Of these C. T. Bundy is practicing law at Eau Claire, R. E. Bundy at Menomonie, and E. W. Bundy at Seattle, Washington.

Judge BUNDY'S career at the bar, up to the time of his election as circuit judge, was signally successful. He was engaged in most of the important trials in his home county. His reputation as an able and honorable practitioner extended throughout Northwestern Wisconsin; so when a vacancy occurred on the bench of his circuit his brethren at the bar called a bar convention and by unanimous vote placed him in nomination for that office. As already stated, he was elected and subsequently three times re-elected, always as a nonpartisan candidate. That his nomination and election were the result of conspicuous merit and fitness will be appreciated when it is remembered that Judge BUNDY was an ardent Democrat, while a large majority of his brethren at the bar, as well as of the electorate of the Eighth circuit, were Republicans.

Judge BUNDY'S long service on the bench of the Eighth circuit entitles him to grateful and respectful remembrance. From the age of forty-four to the age of sixty-four he discharged the difficult and responsible duties of that office in such manner as to earn the respect and lasting gratitude of his constituents. The shadow of suspicion never rested on his integrity. His constant endeavor was to administer justice according to law, without fear or favor. As a presiding judge he was courteous and obliging and always anxious that cases should be disposed of on their merits rather than on points of procedure. He was particularly kind to the younger members of the bar and always took pains, when opportunity permitted, to encourage and advise them. Many a lawyer now well past middle age still remembers with gratitude and affection this trait of the judge.

There was nothing complex in Judge BUNDY'S nature. He was as simple as a child, always approachable and always kindly, but firm and decisive when occasion required. He loved his fellow men and he loved justice.

Such in brief outline was the Judge BUNDY whom we knew and revered. Not merely as lawyer and judge, but as citizen, friend, husband, and father is he affectionately remembered. The world is better for his having lived in it.

W. F. MCNALLY,
THEODORE BUEHLER,
JESSE S. FIELD,
Committee.

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Mr. Justice VINJE, on behalf of the court, responded:

It was not my good fortune to possess a close personal acquaintance with Judge BUNDY, but my acquaintance with him was sufficient to enable me to appreciate the justness of the memorial here presented to his memory, and understandingly to concur in the estimate therein made of his life, character, and public services. His, as has been said, was a simple nature, as indeed must be the nature of every man who possesses a sound judgment, an inherent love for truth and justice, and who loves his fellow men, not because of their social station or wealth, but because of the good qualities they exhibit in their daily life. Though thoroughly democratic in his habits, he possessed a dignity that graced both his private and judicial life. His industry, his unquestioned integrity, his keen perception of essentials, his familiarity with fundamental legal principles, and his almost unerring application thereof to the facts of each case made his work upon the bench closely approach the ideal. Fearless, yet considerate, he administered justice impartially and tempered it with mercy when the occasion required.

To those who were unfamiliar with his mental processes and his habit of going at once to the substance of the controversy his work upon the bench might suggest a brusque and arbitrary mind. The suggestion, however, was thoroughly dissipated upon a closer acquaintance, and was supplanted by a deep respect for his quick grasp of controlling facts and his intolerance of mere trappings. The merit of the case always occupied the central field of his thought and was never lost sight of in the consideration of minor details. This accuracy of legal perspective seemed in his case to be the result of intuition rather than of conscious effort.

His long and busy life in the region of his judicial labors thoroughly familiarized him with the various business enterprises there engaged in, out of which controversies arose, and enabled him to firmly and correctly grasp the facts of each case and to interpret them in the light of the legal rules applicable thereto. He, like many other judges of pioneer days in Northern Wisconsin, assisted ably in so moulding the law that it would adequately fit altered conditions and new activities, thus adapting it to time, place, and circumstances. Only by such judicious adjustment can it continue to adequately serve its purpose.

The state owes a debt of gratitude to its early trial judges who fearlessly maintained the integrity and supremacy of the law at all times and under all circumstances. Pioneer conditions were not always the most favorable for the strict and impartial administration of justice. It often required courage of a high order to fearlessly execute its mandate. To few trial judges is there a greater debt due in this respect

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than to Judge BUNDY, who for nearly twenty years served the people of his circuit and the whole state with such signal ability, fairness, and fearlessness. It is therefore with mingled feelings of sorrow, respect, and gratitude that this court receives and concurs in the fitting memorial to his memory presented by those who came in daily contact with him in both his private and public life and who lived and respected him equally as a neighbor and a judge.

GILBERT M. WOODWARD.

On the 8th day of December, 1914, Mr. Frank Winter of La Crosse presented the following

Memorial of the Bar of La Crosse County.

It has been said that a lawyer writes his name in the sands; that he does his work leaving little or nothing tangible of it behind him; that he is soon forgotten and little mentioned in the community after death, for the reason that his best work is unseen and often unknown except by those immediately interested.

Because this in a measure is true, it is eminently proper that some memorial, in permanent form, of the lawyer who has given a lifetime of highly intelligent and honest service to his profession should be made at his death.

GILBERT MOTIER WOODWARD was alike fortunate in his parentage and the time of his birth. His father was William Woodward, of Washington, D. C., descended of a family residing, for possibly generations, at Philadelphia, Pennsylvania; a family of more than ordinary ability, as shown by the number of prominent men it produced. His mother was Esther Rittenhouse. Hers was the famous Rittenhouse family of Pennsylvania, distinguished in colonial history and in the days immediately following the Revolution.

Mr. WOODWARD was born at Washington, D. C., December 25, 1835. The time of his birth brought him to early manhood in a turbulent and formative period of American history, when population was increasing with giant strides, when industrial life was rapidly changing and taking upon itself new forms, when opinions and ideas were changing even more rapidly than the aspect of physical things. It was the time of the break-up of old political parties and the formation of new; a time when the two rival systems of freedom and slavery that had struggled for supremacy in the nation since the first slave ship landed its cargo of black men in Virginia, were about to carry the contest from the forum and the halls of Congress to the battlefield.

To be thrown, in the formative period of his life, into the very center of the struggle at the capital of the country could not have failed to stimulate the mind, mould the character, and largely control the actions of such a man as GILBERT WOODWARD.

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Gilbert M. Woodward.

Of his early education we know little. There being then no common or high schools at Washington, he was educated in a private school and academy in his native city. He had no opportunity for a collegiate education, for at fifteen he was a printer's apprentice at Baltimore, Maryland, and later a printer and proofreader in Maryland and Washington. He told the writer that when connected with the National Intelligencer at Washington in 1859 and 1860 his most intimate friend was Hugh McNiel, a man somewhat older than Mr. WOODWARD, of high character, aims, and education, who later became distinguished as a soldier, and, as colonel of the Pennsylvania Buck Tails, was killed at Antietam; that with him he used to wander through the woods and fields about Washington, discussing the events and men of the rapidly culminating struggle between the sections. He was an anti-slavery man then, although, as a citizen of the District of Columbia, not a voter.

In February, 1860, why we do not know, Mr. WOODWARD came to La Crosse and began the study of law in the office of Messmore & McKenney, and was admitted at Black River Falls, probably just at the beginning of the Civil War. Without opening a law office, he enlisted in the La Crosse Light Guards, then a militia company, afterwards Company B of the Second Wisconsin Infantry, on May 22, 1861, and was mustered into the United States service as a private June 11, 1861, for three years. No regiment in the Union army has the distinguished record of this regiment. It was in the first battle of the Army of the Potomac at Bull Run in July, 1861, and its remnant, as a battalion only, was a part of that army at Appomattox in 1865. For over three years, with the Iron Brigade, it was in every great battle of the Eastern army, with McClellan in the Peninsula, at Manassas, South Mountain, Antietam, Fredericksburg, Chancellorsville, Gettysburg, the Wilderness, Spottsylvania, and Cold Harbor. Through the great struggle it fought with dauntless bravery, and on every battlefield left its high toll of dead. With most of the few remaining original members of this famous body of men, Mr. WOODWARD was mustered out at Madison June 30, 1864, those re-enlisting being reorganized as a battalion.

This regiment had the highest percentage of killed and wounded of any regiment in the Union army, both in single battle and during its entire term of service. The twenty-nine per cent. of loss of the famous Light Brigade in its charge at Balaklava, and the forty-nine per cent. of the Third Westphalian, German, at Gravelotte, are excelled, in civilized warfare, almost alone by the seventy-two per cent. of killed and wounded of the Second Wisconsin on the first day at Gettysburg.

The rise of Mr. WOODWARD was rapid. He was a private in June, 1861. After an unanimous election by the company he was appointed

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by the captain orderly sergeant in September, 1861. Because of his distinguished service and marked ability in handling men at Gainesville and second Bull Run he was made second lieutenant in August, 1862, first lieutenant in September, 1862, and became adjutant of the regiment in June, 1863. In most regiments the position of adjutant is second only to that of colonel. In this position he was the general favorite of the whole regiment. He was aide-de-camp of General Meredith, commanding the Iron Brigade at Gettysburg, and as such saw the beginning and was active in this great and decisive battle of the Civil War. In this battle, after winning high praise from his superiors and new laurels, he was severely wounded in the right forearm. He was aide-de-camp on the staff of the commander of the Iron Brigade and of General Wordsworth, commanding the Division, until the middle of June, 1864, when most of the regiment returned to Wisconsin to be mustered out. When it is remembered that Mr. WOODWARD was only twenty-six when the war began, his rise from a private to an honorable position in the army shows both his ability as a soldier and its appreciation by his superiors, for Mr. WOODWARD was not one to push himself forward or to intrigue for place. Mr. WOODWARD'S army service gave him an intense interest in everything connected with the Civil War. His knowledge of the great struggle and the issues involved was comprehensive and accurate. To the last he delighted to read its history and to study its campaigns.

In 1864 Mr. WOODWARD began the practice of law at La Crosse and soon held public position. Mr. WOODWARD was fortunate in that, unlike many lawyers, he held official positions, sometimes notable, without acquiring the itching for office or losing his love of the law. He has escaped the oblivion that sometimes comes after death to the able lawyer who has held no official position, without ruining his career as a lawyer.

In April, 1865, he became city attorney, and from 1867 to 1871 he was elected, as a Republican, district attorney of La Crosse county. In 1872 he joined the Liberal Republican wing of the Republican party, and attended the Liberal Republican convention at Cincinnati that year. In 1874, as a Democrat, he was elected mayor of La Crosse, and in 1876 city attorney, which position he ably filled for several years. In 1882 he was elected a member of Congress from the Seventh Wisconsin district, but was defeated in 1884, the district being hopelessly Republican under ordinary circumstances. Only Mr. WOODWARD'S recognized ability, fairness, and kindly personality enabled him to be elected at all. In 1886 he was the candidate of his party for governor, and was delegate at large to the Democratic national convention in 1888, acting as chairman of the delegation. This ended his public service except as a member and president of the police and fire commission of La Crosse for some seven years and

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until within a year of his death; member of the state board of law examiners for ten years; president of associated charities for some years; and a member and vice-president of Washburn Library board since its creation.

He filled every position creditably and with notable ability. His service in Congress was so short that he did not become identified as a leader with any particular policy or measure, but he was recognized by the speaker, Mr. Carlisle, who was his personal friend, and by his associates, as an able and industrious member.

In the senatorial contest in which Mr. Mitchell was elected, Mr. WOODWARD represented the old commander of the Iron Brigade, General Bragg, and when the Democratic caucus seemed hopelessly deadlocked was unanimously offered the senatorship. His answer was characteristic: "I will not accept it. I am for General Bragg, even if he is defeated."

Mr. Woodward as a Lawyer.

While his name may be longer preserved as a soldier and public official, we as lawyers are most interested and will remember him best and longest as a lawyer.

On leaving the army he practiced law alone, but in January, 1868, he formed a partnership with the late S. S. Burton, continuing until 1876 as Burton & Woodward. From that time until his partnership with Mr. J. W. Losey he practiced alone. In January, 1889, he formed a partnership with Mr. J. W. Losey, then the leading lawyer in Western Wisconsin, which partnership continued until the death of Mr. Losey in 1901, Mr. Andrew Lees having also become a member of the firm in 1900. On the death of Mr. Losey the firm became Woodward & Lees, and so remained until Mr. WOODWARD'S death March 13, 1914. Before his connection with Mr. Losey and while practicing alone, although he was recognized as an able lawyer and a student of the law, he did not seem to seek or desire an extensive practice.

No one can conceive of GILBERT WOODWARD soliciting business, or even joining social organizations he did not care for, for the purpose of obtaining it. While practicing alone his habits were studious. He thoroughly prepared his cases for trial, kept abreast of the law by a constant reading of reports and reporters and by copious annotations of statutes and the Wisconsin Reports, and had a select clientage, including one or two of the leading lumbermen. When the wider field opened on his becoming Mr. Losey's partner, it found him thoroughly prepared. As Mr. Losey once remarked when Mr. WOODWARD became his partner, "I consider him the most valuable man as a partner in La Crosse, on account of his studious habits, good judgment, and great knowledge of the law." Mr. Losey was the chief trial lawyer of the firm as long as he lived, and while Mr. WOODWARD generally sat in and assisted on the trial of important cases, his chief

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work was the preparation of the law of the case before trial, the presentation of it to the court during trial, and, above all, the preparation of the case for appeal, the making of the appeal brief, and the presentation of the case to the Supreme Court or other appellate tribunal. This work he excelled in. The Supreme Court Reports of the state are Mr. WOODWARD'S best monument.

During the entire time Mr. WOODWARD was a member of the firm of Losey & Woodward, and after the death of Mr. Losey, Mr. WOODWARD'S firm had an extensive trial business. Many of their cases went to the state Supreme Court or the United States Court of Appeals. For many years almost no term of the Supreme Court passed without the presence of Mr. WOODWARD, and frequently he made briefs and appeared in several cases, often from different circuits.

Many of these cases were cases of first instance and have become leading cases. Among these may be mentioned *Black River Imp. Co. v. La Crosse B. & T. Co.* 54 Wis. 659, passing on the right of a corporation, chartered for the purpose of improving a river, to close navigable side channels and chutes to the detriment of riparian owners without compensation; *La Crosse City R. Co. v. Higbee*, 107 Wis. 389, holding that an electric street railway and its trolley poles is not an additional burden on the fee over the burden imposed by a street railway using horses, and further distinguishing between the right, without compensation, to erect a telephone or telegraph pole and the right to set up a trolley pole in the street adjacent to the owner's land; *Cawley v. La Crosse City R. Co.* 101 Wis. 145, deciding to what extent the uncorroborated testimony of one interested, in opposition to admitted physical facts, requires submission to a jury; *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, interpreting the Public Utilities Law and deciding to what extent a franchise granted by the city is a contract and the effect on the franchise of coming under an indeterminate permit; *Chicago, B. & Q. R. Co. v. Railroad Commission*, 152 Wis. 654, upholding an order of the railroad commission requiring the stopping of certain interstate trains at Cochrane as a reasonable regulation. This case is now pending in the Supreme Court of the United States. It was one of the last, if not the very last, case argued by Mr. WOODWARD in our Supreme Court, and his brief, made when he was over seventy-seven years of age, shows all the industry, clearness, and mental acumen of a man at his best.

Mr. WOODWARD'S briefs were clear, methodical, and exhaustive, leaving little of the law applicable to the case unexamined. He discerned clearly the main question and presented it to the court fully, fairly, and convincingly. He never misstated or glossed over the opposing lawyer's facts or law. He was eminently fair both in his briefs and in his oral arguments. He had and was entitled to the respect of the court, and was generally listened to with more than usual attention.

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He was a dangerous lawyer to meet in the Supreme Court because of his clearness of perception, great knowledge of general principles and case law, and indefatigable industry. His briefs were models of clear, classical English without being pedantic.

As a lawyer Mr. WOODWARD was eminently honest and upright and actuated by the highest of ideals. He was not simply honest in his conduct, but he was intellectually honest. He did not deceive himself as to his case any more than he did the court. He analyzed his own case with intelligent, painstaking labor, and dissected his opponent's case with keen discrimination.

Mr. WOODWARD had the faculty of concentration in a marked degree. He never tired of work. He carefully read the law periodicals until his last illness and annotated his statutes and Wisconsin Reports copiously.

He had a remarkably accurate and retentive memory and could recall the leading case on almost every disputed question. He seemed to desire to know the law, not merely as a means of winning cases and obtaining a livelihood, but for its own sake and because he loved its study. Notwithstanding his great industry, high legal accomplishments, and intellectual ability, the lawyers who have most often met him and who knew him best will first recall and longest remember him for what might be called his moral qualities as a lawyer. He had the highest regard for the ethics of his profession and the clearest perception of the right or wrong of a thing. It was no effort for him to do right—he did it instinctively. He was kind and generous toward his professional opponents, and would go out of his way to oblige if he could do it without injury to the interests of his client. In short, Mr. WOODWARD's essential nobility of character manifested itself in the practice of his profession as it did in other walks of life. In his death our profession has met a distinctive loss.

Mr. Woodward as a Scholar and Man.

Mr. WOODWARD was not simply and only a lawyer; he was a scholar in some lines of more than ordinary attainments. His early education, in school and academy, must have been limited, because he was at work as a printer at fifteen, and possibly left school shortly after. Although he left school at this early age, he had acquired some proficiency in the Latin, French, and German languages, and had acquired a consuming desire to know more of them and of other languages through a critical and extended study. The text-books and grammars in his library at his death, many of them containing memoranda as to when he read or studied them, show that in early life he began a systematic and critical study of languages which he continued up to his last year. He had acquired not simply a superficial knowledge of one or two or of a few of the languages of Europe, but he had

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a critical knowledge of almost every European language; not simply of the languages of today, but of the root languages—Latin, Greek, Old Saxon, and Sanscrit.

He studied a language not simply to be able in some manner to pronounce and understand it, but to know its grammar and the origin of its words and phrases. He knew it not simply in its present form but in its primitive form. When he had acquired proficiency in a language he delighted to read its literature and appreciated its classics.

He was familiar with, and evidently read with ease, Latin, Greek, French, German, Italian, Spanish, and Danish, and possibly other languages of Europe.

He possessed a considerable library of the best works in these languages, and his books show he read them and did not buy them simply from curiosity or for mere reference. He owned, and evidently had read understandingly, Latin, Greek, English, French, and German classics printed in the earlier part of the seventeenth century, soon after the invention of printing. The type as well as the text was often archaic, and is difficult to read by a modern scholar even when he is familiar with the language, but memoranda on the margin show Mr. WOODWARD read them. When we consider Mr. WOODWARD'S devotion to the law, his knowledge of foreign languages so much beyond the usual acquirements even of students of language seems the more extraordinary.

Nor did he confine his critical study alone to languages. His knowledge of history, ancient and modern, was exact and extensive. His remarkable memory fixed all he read, whether as a pastime or a study, and he had it readily at hand as those of us know who have talked with him on matters of history. He especially knew the political history of his own country, and in general of the English-speaking people.

He had an intense love of nature. Almost every pleasant Sunday for years he drove or walked somewhere into the country. He knew apparently every vista of the hills and bluffs of La Crosse and Houston counties. The woods and streams were to him a constant source of pleasure. He for years rented a few acres of ground in Coon Valley, where he could build a fire and picnic as he pleased. He knew the flowers and when and where they were to be found. Unlike many men who love the woods and streams, he cared nothing for hunting and fishing.

While Mr. WOODWARD was a student and a lover of nature and therefore much by himself, mingling little in society, he was by no means a recluse. He took an active interest in the every-day life of the community. In 1868 he was instrumental in organizing the Young Men's Library Association and in founding the first public library in La Crosse. To him more than to any one else was due the success with

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which this library was conducted until it was purchased by the Washburn Library board and became the nucleus of the present public library. It was undoubtedly the intention of General Washburn to create an additional building fund for the library he had given $50,000 in his will to found, but for some reason he neglected to do it, and on his death the trustees found themselves unable to use more than one fourth of the fund for building purposes. In this emergency, through Mr. WOODWARD'S influence, a way was discovered to use a larger portion of the fund for building purposes without violating the provisions of the will. The Young Men's Library Association sold their library to the Washburn trustees for $7,000, which the Young Men's Library Association immediately donated to the Washburn building fund, thereby enabling the erection of the first Washburn Library building. He was an alternate member of the board of trustees by the will of General Washburn, and on the book committee almost from the first, and at the death of Judge Burton became a trustee, serving as vice-president of the board for many years until his death. As a member of the book committee his extensive and critical knowledge of books was invaluable to the library.

As a member, and for some years the president, of the police and fire commission of La Crosse, he ungrudgingly gave his services to the community.

He was a charter member of Wilson Colwell Post of the Grand Army of the Republic and remained an active member until his death. He was also a member of the Loyal Legion and of the Iron Brigade Association, and was a large contributor to the fund for the erection of the soldiers' monument in our cemetery. His purse was always open to his soldier comrades. Although then in feeble health, he visited Gettysburg last year, on the fiftieth anniversary of the battle, to meet for the last time many of the soldiers he stood with there. His recollection of the great struggle was vivid. His position as a staff officer gave him more than an ordinary opportunity for observation, and those of us to whom he narrated incidents coming within his own personal notice believe that a serious loss occurred when he refused the offer of the Wisconsin Historical Society to publish his personal recollections of the Civil War and especially of the first day at Gettysburg. His remarkable command of the English language might have enabled him to write a description of the first day as vivid as Lieutenant Haskell's classical Battle of Gettysburg, covering the last two days, published by the society, a narrative now regarded by scholars as a model of dramatic descriptive prose, written by a friend of Mr. WOODWARD, another staff officer of the Iron Brigade.

A more extended notice of his various activities in the community would too much prolong this memorial. It can be truthfully said that for many years hardly anything was done for the advancement

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of the civic or industrial life of the community that he did not take an active interest in.

Mr. WOODWARD wrote a pure, classical English. His extensive study of foreign literature in the original and his familiarity with the best English literature gave him models. His law briefs were notable examples of law writing.

In his earlier days, before his partnership with Mr. Losey, he is understood to have written to some extent for the press, but his work being generally unsigned is lost. He collected a considerable library, especially rich in early editions of classical Latin and French authors. Possibly because he was a printer, he seemed especially to have sought early examples of the art of printing, and his collection contains such examples from the presses of famous masters of the art, from soon after the invention of printing through the sixteenth and seventeenth centuries, mostly in Latin.

Mr. WOODWARD was modest and reticent to a degree concerning himself, hence little is known of his literary work. This characteristic modesty and reticence led him to conceal his many contributions to civic enterprises and private charities. He is known to have given away thousands of dollars to the sick and needy and to have contributed generously for public purposes. He cared nothing for wealth. With a practice that would have enabled him to leave behind a fortune, he left only a modest competence. He knew, however, the true wealth of the world: its vast literature, the product of the best minds of the ages, its hills, valleys, and streams, teeming with life, vocal to him who can hear their voice. Of him it could be said that "holding converse with Nature in her visible forms, she spoke to him a various language."

Deprived by death, in 1868, at once of both wife and child after a happy married life of one year, he did not become a misanthrope or recluse. Notwithstanding his domestic misfortune, which seems ever afterward to have prevented him from forming family ties, he eventually determined to make the most of life.

To the writer, except for his lack of domestic ties, GILBERT WOODWARD seems to have lived the most sensible, perfect, and complete life of any lawyer he has ever known.

He was genial and kind in his association with his fellow men. He was absolutely honest with others and himself. He generously and ungrudgingly gave to his country and the community his best service. With the highest ideals and love of justice, he studiously and with rare concentration pursued the critical study of the law for its own sake, until he became both a wise and a learned lawyer. He knew the value of wealth and its worthlessness as mere wealth, and did not make its pursuit the dominating force in his life. He loved history and literature, and in his leisure moments was able to commune, and

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communed, with the greatest minds of the world in the languages they used. He loved and understood Nature. To him the world, with its wealth of history, literature, and beauty, was an open book. He lived respected by the community for his real worth, and by his brother lawyers for his high character as a lawyer and great legal ability; and died loved by those who met him intimately in the relations of life.

Mr. Burr W. Jones of Madison then spoke as follows:

May it please the Court:—I suppose that I was requested by the committee of the La Crosse County Bar Association to participate in these proceedings partly because of my long friendship for Mr. WOODWARD and partly because I had the opportunity to know him well during his service as a representative in Congress.

It has always been my impression that Mr. WOODWARD had little natural fondness for political life. But his ability, his fine military record, and his sterling integrity made him the natural choice of his party on various occasions for political honors.

In 1882 he was nominated by the Democrats of his district as their candidate for Congress. The district was supposed to be hopelessly Republican, but he accepted the nomination, and to his great surprise was elected.

During his service in Congress he was a member of the very important committee on Commerce, and by his faithful work won the special confidence and regard of its distinguished chairman, John H. Reagan.

Speaker Carlisle soon learned of Mr. WOODWARD'S fondness for books and libraries and very appropriately appointed him a member of the committee on the Congressional Library.

He was deeply interested in the work of both these committees, and even if he had remained much longer in Congress would no doubt have found this kind of work more to his liking than the contentions of Congressional debate.

The general public knew Mr. WOODWARD as a brave soldier, an able and upright lawyer, and a trusted political leader. But it was reserved to those who knew him more intimately as a personal friend to appreciate most keenly the qualities which endeared him to his many friends.

No one could more conscientiously perform his public or professional duties, but it has always seemed to me that literature and his friends were the greatest solace of his life. He was like his long-time personal friend, Judge ROMANZO BUNN, in his devotion to the best of English literature.

He had few contemporaries in his profession who traveled so many unfrequented paths in literature or who knew its main roads so well.

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Gilbert M. Woodward.

It was left to those who had long visits with Mr. WOODWARD in which he talked of his profession, the Civil War, and politics, and especially the books he loved, to fully understand the real man, his breadth of view, his delicious sense of humor, and his charitableness for his fellow men.

Those who knew Colonel WOODWARD will agree that he was one of the choicest and one of the last of the brave lawyers of Wisconsin who in the courts of justice, on the battlefield of the Civil War, and in public life have won the love and gratitude of their state.

On behalf of the court Mr. Chief Justice WINSLOW responded:

The memorial just read sets forth faithfully and eloquently the salient features in the life, character, and services of one of nature's noblemen. The court receives it gladly. It is fitting that enduring record should be made of such a character, not merely in justice to him who has thus completed life's journey, but in kindness to them that follow after, to whose vision the journey is yet long and pleasant, and from whom the difficulties and dangers are yet mercifully hid.

It was not my good fortune to know Mr. WOODWARD during the earlier years of his practice, but upon my appointment to this bench I speedily made his acquaintance and can unreservedly testify to all that has been so well said concerning his ability as a lawyer, his character as a citizen, and his charm as a friend. He was frequently here with important cases during the first ten or twelve years of my service here, always with a logical, clear, and scholarly brief, and always with an illuminating oral presentation of his positions.

He had the habit when he came up to argue a case of calling on the justices of this court (a habit which I wish more of the bar would cultivate) and of spending a little time in conversation. As a conversationalist he had few superiors. His long and varied experiences in life had given him a store of reminiscence, information, and practical wisdom which few men have and upon which he could draw at will. Never can I forget the charm of those brief visits when wit, sparkling anecdote, classic allusion, and accurate learning seemed to flow without effort and as matter of course.

It is interesting to know that he obtained his education by his own efforts, not in any college or university, but by careful reading and study of the books which he accumulated, and that a great part of this work was done during his mature, if not during his later, years. Very few of those professional men who have had the advantage of a liberal education keep up their early studies in later life, to say nothing of extending them and adding new fields of general knowledge to their store. Our friend believed with Carlyle that the true university is a collection of good books, and in this university he matriculated

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early, and here I believe he found his chiefest enjoyment during his entire life.

I do not think he really enjoyed the trial or argument of cases in court. I remember that on the occasion of one of his last arguments in this court he said to me before the opening of court, "I don't see what good I can do by making an oral argument in this case; I have put my best thought and best logic into my brief and I can add nothing to it; if I were to consult my own wishes I would submit the case on the brief, but my client insisted on my coming and so I am going to bother you for awhile." He had done the work of the lawyer, the scholar, and logician in the preparation of the brief and had done it well, and he saw no good reason for attempting to add to it by any attempt at oratory.

By disposition and temperament he was a scholar rather than an orator, a student rather than a man of affairs. I can well imagine the delight with which he would turn to his library of rare and precious volumes after a day of legal drudgery in the office, and there lose himself in the "sweet serenity of books."

That our deceased friend was a brave and accomplished soldier none who knew him well can doubt. Indeed the man who rose from the ranks to be an officer in the far-famed Iron Brigade could be none other. In death as in life he has followed close upon the footsteps of his illustrious commander, Edward S. Bragg. Like him, he perilled his life for the preservation of his country's life; like him, he lived to return to civil life and to attain a very high rank at the bar; like him, he lived to a ripe age, secure in the confidence, the respect, and the love of his fellow men; like him, he has answered to the final roll call and added another name to that brilliant death roll of lawyer-soldiers of which our profession is so justly proud.

JOHN J. FRUIT.

Mr. William S. Burroughs of La Crosse then addressed the court and said:

May it please the Court:—The surviving and remaining members of the committee appointed by the La Crosse Bar Association respectfully ask permission at this time to present their memorial of the life of the late JOHN J. FRUIT, who at his death, which occurred at the city of La Crosse on the 27th day of May, A. D. 1909, was judge of the Sixth judicial circuit of this state, and to pray that the same may be entered upon and made a part of the permanent records of this court.

Memorial of the Bar of La Crosse County.

JOHN J. FRUIT, judge of the circuit court for La Crosse county and of the Sixth judicial circuit of the state of Wisconsin, died at the city of La Crosse on Thursday, May 27, 1909.

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John J. Fruit.

Judge FRUIT was born at Lima, Grant county, Wisconsin, March 29, 1849. His father, Perry Fruit, was a native of Illinois, and a farmer. His early years were spent in the ordinary labors of a farmer's son and in attendance upon the common schools of the neighborhood. In 1865, when sixteen years of age, he entered the state normal school at Platteville in Grant county to qualify himself for the profession of a teacher. He graduated from the normal school and received his diploma at the age of twenty-two. After teaching a short time in a district school at Montfort in Grant county, he came to La Crosse, and in August, 1871, was appointed principal of the Fifth district (North La Crosse) school. This position he held for four years, during which he established his reputation as an earnest, conscientious, and successful teacher. This was followed by one year of service as principal of the Third district school.

It had been the ambition of his life to enter the profession of law, and during all the years that he was engaged in teaching he gave his leisure to legal studies. In 1876 he abandoned teaching entirely and entered the office of Hon. James I. Lyndes, then one of the leading members of this bar. Then entering the law department of the State University of Wisconsin, he was graduated with the class of 1877, and at once formed a partnership for the practice of the law with Mr. Herman Pfund under the name of Fruit & Pfund. This partnership was of short duration, and Mr. FRUIT continued alone in practice until June, 1880. In this year he entered into partnership with John Brindley under the firm name of Fruit & Brindley, a relation which continued until Mr. Brindley's election as county judge in January, 1898. This firm won and held a prominent position in the bar of the Sixth judicial circuit, being engaged in a creditable manner in very much of the most important litigation of the period. As its senior partner Mr. FRUIT had opportunity to demonstrate in a marked degree the possession of those qualities of industry, carefulness, and sound judgment which, combined with accurate legal learning and high standards of personal and professional conduct, marked him as fit for the great promotion which came to him later.

During this period he served for one year as superintendent of schools of the city of La Crosse; for five years as district attorney of La Crosse county; and for several years subsequent to 1890 as assistant United States district attorney for the Western district of Wisconsin. In this last position particularly he so distinguished himself by his industry and ability as to win the warm approval of the court and his superiors and to become widely and favorably known to the bar of the state.

In 1896 he was appointed a member of the state board of normal schools, and in 1899 he was appointed for a second term, in which he continued to act until he became circuit judge. In his service of

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nearly five years on this important board he became one of its most influential members, being chosen as its vice-president and finally as president. He took great pride in fulfilling the duties of this position and bestowed upon it the highest degree of care and attention. Through this work he became widely known and highly regarded among educators of the state.

Mr. Brindley having retired from practice to become county judge in 1898, Mr. FRUIT entered into partnership with Mr. Geo. H. Gordon under the name of Fruit & Gordon. This firm continued not quite three years. Upon the death of Circuit Judge O. B. WYMAN December 2, 1900, Mr. FRUIT was appointed circuit judge until the next election. In April, 1901, he was elected by the people to fill the remainder of Judge WYMAN'S term and also for the next ensuing term of six years; and in April, 1906, he was again and without opposition elected circuit judge for the term of six years commencing in January, 1907.

The territory embraced in the Sixth circuit during Judge FRUIT'S incumbency of the office—the counties of La Crosse, Monroe, Vernon, Juneau, and Trempealeau—contains a much larger population than any other circuit in the state, and the volume of business constantly growing taxed his strength and energies to a degree which finally became unbearable. In the winter of 1909 the legislature took action to relieve Judge FRUIT of a part of his burden by detaching Juneau county from his circuit. It was too late. The news of this action came to him on his deathbed, a victim of overwork and strenuous devotion to duty.

Judge FRUIT was a man of large frame and great natural strength and vigor, and under all ordinary circumstances might have been expected to live in the full enjoyment of his powers far beyond the allotment of three score years and ten. But the never-ending round of his judicial duties, leaving almost no opportunities for rest or recreation, began to show its effects as early as the spring of 1908. A short vacation in the summer of that year proved insufficient to restore him, and in December he gave up work entirely and went to French Lick Springs in Indiana. From there he went to a hospital in Milwaukee, and in March, 1909, returned to La Crosse, a pathetic figure of a man broken down in his prime. After a few painful efforts to perform his duties as a judge at chambers he went to St. Francis Hospital for treatment, and there, on Thursday, May 27, 1909, gave up the struggle.

Not only among the members of this bar, who knew him best, but throughout the community in which he had lived and the judicial circuit in which for eight years he had labored in the public view, the announcement of his death was received with universal sorrow.

And so, at an age in which his mental powers should have been strongest, in the prime of life, fully ripened by experience for useful public service in his high office, he has passed from among us, and

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we may say of him in the words of the prophet: "He hath given up the ghost; his sun is gone down while it was yet day."

This record of his professional career and of the public positions held by him leaves little more to be said. It speaks for itself and shows widespread belief in his ability, industry, faithfulness, and moral worth.

In any attempted estimate of the character of Judge FRUIT it would be a small thing to say of him that he was honest and was always guided by a sincere desire to administer his office in the interests of law and justice only, and without fear, favor, affection, or personal bias. This is expected and always assumed to be the fact. And the very nature of the judicial office irresistibly imposes upon every normal mind the necessity of such course of conduct. The responsibility of the position is of so high degree as to arouse the moral sense and render the judge alert to resist suggestions to the prejudice of exact justice, and eager to find and apply fearlessly the facts and principles which lead to a correct decision. The native integrity of his character, fortified by training and education and the habits of a lifetime, enabled him to meet this responsibility without effort.

The pains and labor which it required in the hearing of testimony and arguments, the examination of facts, and the investigation and comparison of decided cases and established principles of law in the effort to discover true rules of decision were freely and ungrudgingly bestowed. Counsel were listened to with patience and kindness and their points and authorities fully and carefully considered, in a manner which left untried no means of arriving at the truth.

Judge FRUIT was not an innovator, or reformer of the law. He made no epigrams, and indulged in no attempts to alter the fundamental rules of the social order as he found it. He was content to follow on level lines the ways blazed out by experience and approved by the courts as responsive to the needs and the average sense of average men. As a man, a lawyer, and a judge, his conduct and example tended to honest and clean living, sound thinking, and a morality, public and private, in harmony with the highest standards of good citizenship. In all things he maintained at their best the traditions of the judicial office in this circuit, and left behind him the influence of a pure private life as a man, a successful career as an honest lawyer, and long incumbency as a judge marked by ability, patient and conscientious labor, and unspotted integrity.

G. M. WOODWARD.
C. L. HOOD.
BENJ. F. BRYANT.
GEORGE H. GORDON.
JOHN BRINDLEY.

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Mr. Chief Justice WINSLOW responded for the court:

In the death of JOHN J. FRUIT the legal profession lost a valued member and the bench an eminently able judge. I knew him, although not with great intimacy, since his entry upon the practice. At that time he came to Racine thinking possibly to locate there, but finally determined in favor of La Crosse.

I well remember the favorable impression which his engaging manner, his earnestness, his evident candor and honesty of mind and heart then made upon me. It seemed to me then that he could not fail to attain a high position among his brethren at the bar as well as in the community generally in any city where he might decide to locate.

Events have shown that I was not wrong in my estimate of the man. Success at the bar came to him gradually and surely, not merely because of his legal ability, but also because of the confidence which his fellow men felt in his character, and this is the most enduring success of all.

I think his temperament was always rather that of a judge than that of an advocate, and so it was entirely fitting that he should be removed in due time to the circuit bench. The record shows that while in this position he demonstrated his fitness for the judicial office fully and completely.

It is impossible for the finite mind to understand why it was necessary that he should die in the very midst of his usefulness and while life seemed yet to hold for him much of honor and of service to the world. Yet so it was.

The record of an honorable and eminently useful life has been finally made up. Length of days does not always measure usefulness nor make a life complete.

The life of Judge FRUIT, short as it was, bears a lesson which every young man may profitably heed, namely, the lesson that a life of industry, integrity, high ideals, and service to fellow man constitutes real success whether the years of that life be few or many.

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CASES DETERMINED

AT THE

August Term, 1914.

PFEIFER, Appellant, vs. LAYTON PARK OIL & SOAP COMPANY, Respondent.

October 30—November 17, 1914.

Exchange of chattel for land: Rescission: Lack of title to land: Constructive notice: Offer to return: Replevin: Damages: Form of judgment: Milwaukee civil court.

1. One who traded a horse for a specified quantity of gravel to be taken from certain land to which, as the record showed, the other party had no title, had constructive notice of such lack of title and could not afterwards rescind the trade on that ground.
2. Nor, having already taken a part of the gravel, could he rescind without offering to return the gravel or its value either to the other party to the trade or to whoever was entitled thereto.
3. In replevin the measure of defendant's damages for the taking and detention of the chattel seized on the writ is the reasonable value of its use for the time it is detained, not interest on its value.
4. An action of replevin in the Milwaukee civil court being governed by the rules and statutes applicable to such actions in justices' courts, where the chattel in suit has been seized by the sheriff under the writ, if the plaintiff fails to recover there should not be a judgment for defendant in the alternative for a return of the chattel or for its value, but there should be, under sec. 3743, Stats., an order for its return to defendant and judgment for damages only. The chattel is, in such a case, in the custody of the court even though, by arrangement between the sheriff and the plaintiff, it has been turned over to the latter.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Modified and affirmed.*

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Action of replevin to recover possession of a horse, begun December 29, 1913, in the civil court of Milwaukee county. September 12, 1913, plaintiff obtained a permit from the defendant to take not to exceed 600 loads of gravel and sand out of its pits in payment for the horse in question, which he then delivered to defendant. One Leo Hofmeister was president of the defendant corporation and the gravel and sand pits belonged to him subject to two mortgages of record, one of which was foreclosed, but the time for redemption had not expired at the time of the trial. The preceding March Hofmeister went into voluntary bankruptcy and scheduled the two pits subject to the mortgages. Prior to December 24, 1913, plaintiff removed 188 loads of gravel and sand from the two pits. He was then notified by one of the mortgagees not to remove any more and that he would be held responsible for what he had taken. He also then learned about the bankruptcy proceedings and that Hofmeister had not been discharged, whereupon he served a notice upon the defendant that he had elected to rescind the agreement and demanded a return of the horse. The defendant refused to return the horse and this action was begun.

The civil court found that the defendant was at the commencement of the action entitled to the possession of the horse; that it was seized by the sheriff; that its value was $100; and that defendant sustained damages in the sum of $10 by the seizure and detention of the horse. Its judgment was:

"It is adjudged: That the sheriff of Milwaukee county be and he is hereby ordered to return the property seized by him, to wit, one bay horse with white star on forehead, six years old, to the defendant, and in case return thereof cannot be made that defendant have judgment against the plaintiff for the value thereof, to wit, $100. It is further adjudged: That the defendant, *Layton Park Oil & Soap Company*, have judgment against the plaintiff, *Jacob Pfeifer*, for ten dollars

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($10) damages and ten and 26/100 dollars ($10.26) costs, in all twenty and 26/100 dollars ($20.26)."

The plaintiff appealed to the circuit court. It adjudged:

"1. That the judgment of the civil court . . . be, and the same is hereby affirmed, and that the defendant do have and recover of the sheriff of Milwaukee county and of the plaintiff the property seized by said sheriff and delivered to the plaintiff, to wit, one bay horse with white star on forehead, six years old, and in case return of said horse cannot be made that then the said defendant do have and recover of the said sheriff of Milwaukee county and of the plaintiff the sum of $100, the value of said horse, defendant's damages, assessed and found as aforesaid by the civil court of Milwaukee county.

"2. It is further adjudged: That the defendant have judgment against the plaintiff, *Jacob Pfeifer,* for $20.26, being the amount of its damages and costs in civil court, and for $39, being the amount of its further damages for the continued detention of its property since the entry of judgment in the civil court, found in this court, and for its costs and disbursements in this court taxed at $23.18, in the aggregate for $82.44, and that it have execution therefor.

"3. It is further adjudged that on filing proof of service of notice of entry together with a copy of this judgment on the sheriff of Milwaukee county and upon the attorneys for the plaintiff, and of demand made both upon the sheriff of Milwaukee county and the attorneys for the plaintiff, and proof by affidavit of the failure or refusal of said sheriff and the plaintiff to return the said horse, in as good condition as when taken, to the possession of the defendant within five days after such service of notice and demand, the defendant may, on filing his election in writing to take judgment for the value of the horse, have judgment therefor and have execution issued thereon against the sheriff of Milwaukee county and against the plaintiff for the sum of $100, in addition to the above and foregoing sum of $82.44 for damages for detention and costs, in all the sum of $182.44."

From that judgment the plaintiff appealed.

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The cause was submitted for the appellant on the brief of *Lorenz & Lorenz,* and for the respondent on that of *John T. Kelly.*

VINJE, J. Plaintiff claims that the circuit court erred in four particulars in its affirmance of the judgment of the civil court. It erred (1) in finding that the defendant was entitled to the possession of the horse; (2) in finding that the defendant was damaged in the sum of $10 by reason of its seizure and detention as found by the civil court, and in the additional sum of $39 as found by the circuit court; (3) in awarding judgment for $100, the value of the horse as found, in the event the return of the horse could not be had; and (4) in finding its value to be $100.

1. In support of the contention that the court erred in finding that the defendant was entitled to the possession of the horse it is urged that it did not have title to the gravel and sand traded for the horse, because the real estate was mortgaged and was listed in bankruptcy proceedings and so the owner's equity had passed to the trustee in bankruptcy, and because defendant had only a lease of it from Hofmeister, which did not authorize it to commit waste or to remove gravel or sand therefrom. The weakness of the contention lies in the fact that plaintiff was trading his horse for real estate and was chargeable with notice of the record title of such real estate. The record showed defendant had no title. Plaintiff therefore had constructive notice of its lack of title. No claim is made that plaintiff was deceived, or deterred from examining the record title, by any statements or representations made by the defendant.

But, even assuming that plaintiff had a right to rely upon the title being in the defendant, he did not by merely demanding the horse become entitled to a rescission of the contract. At the time he demanded the horse he had received 188 of the 600 loads, or nearly one third of the purchase

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price. He did not offer to return the loads received or their value. This he should have done to entitle him to a rescission. *Potter v. Taggart,* 54 Wis. 395, 11 N. W. 678; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 439, 89 N. W. 538, 92 N. W. 246. If he thought, in view of the claim made by the mortgagee, that it was not safe to return the value of the loads to the defendant, he should at least have indicated a willingness to make return thereof to whoever was entitled thereto. This he did not do. So it must be held the court properly found defendant was entitled to the possession of the horse at the time the suit was begun.

2. The measure of damages for the caption and detention in a case of this kind is the reasonable value of the use per day of the chattel seized and detained and not interest on the value of the chattel. *Zitske v. Goldberg,* 38 Wis. 216, 224. The evidence showed the value of the use of the horse was from $1 to $2 per day. It was seized December 29th and judgment entered in the civil court January 6th next. Under the evidence the assessment of damages was amply sustained. In the circuit court the defendant recovered only the sums actually and reasonably paid out by it between January 6th and March 8th, on which date it bought another horse to take the place of the one seized, and from which time up to May 16th, when the judgment was entered, no damages were allowed. Surely the plaintiff cannot justly complain of a ruling so favorable to him.

3. Instead of rendering a judgment in the alternative, both the civil and circuit courts should have entered a judgment for a return of the horse together with damages for its detention. The action was replevin brought in the civil court so the rules and statutes applicable to such actions in justices' courts govern. Sec. 14, ch. 549, Laws of 1909, as amended by sec. 6, ch. 425, Laws of 1911 (Hirschberg's Milwaukee County Laws, sec. 1308). The subject matter of the suit, the horse, was seized by the sheriff under the writ,

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and upon the trial the plaintiff failed to recover. In such a case the statute, sec. 3743, provides for an order for a return of the property and a judgment for damages only. It is only in cases where the property has not been seized that a judgment for the return of the property or for its value may be entered in justice's court. Secs. 3738, 3748. Sec. 3736 directs the officer to keep the property seized until the cause is decided by the justice. So at the time of the trial the horse was in the custody of the court. When that is the case a judgment for its return alone, with damages, is sufficient independent of statutes regulating the form of judgment to be entered. Cobbey, Replevin (2d ed.) § 1110; Wells, Replevin (2d ed.) § 771. If the statute prescribes the kind of judgment to be entered, as here, that must be the judgment of the court. The fact that in this case, by an arrangement between the sheriff and plaintiff, the horse was turned over to the latter, did not change the legal custody of the horse. It was still in the sheriff, and he was answerable to either party for its return upon the order of the court. So much of the judgment of the circuit court, therefore, as is in excess of a judgment for the return of the property from the sheriff and a judgment against the plaintiff for the damages found by both courts and costs is erroneous and is ordered stricken out. The judgment as so modified is affirmed, without costs, except that the respondent pay the clerk's fees in this court.

4. In view of the modification of the judgment as just stated the question of the value of the horse becomes immaterial.

By the Court.—Judgment modified as indicated in the opinion, and as so modified affirmed.

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KNAUER, Appellant, vs. JOSEPH SCHLITZ BREWING COMPANY and another, Respondents.

October 30—November 17, 1914.

Master and servant: Injury: Assumption of risk: Contributory negligence: Negligence of person other than employer: Railroads: Questions for jury.

1. An employee of a brewing company who, while driving out of an alley and across a private track in the brewery grounds, was injured by a railway car which had been shunted in upon such track without warning, and who had full knowledge that cars for the use of the brewing company were constantly shunted in upon such track in that manner, is *held*, as between himself and his employer, to have assumed the risk.
2. Although assumption of risk has often been spoken of as a form of contributory negligence, there is a distinction between the two, and one may exist without the other. Assumption of risk, in its strict sense, exists only as an incident of contractual relations and does not involve violation of any legal duty; while contributory negligence, strictly so called, does not necessarily arise from contractual relations and is a violation of duty.
3. Although an employee of a brewing company had, as between himself and his employer, assumed the risk of injury from cars shunted in by a railway company upon a private track of the brewing company, such assumption of risk did not absolve the railway company from its obligation to exercise ordinary care, nor was it necessarily contributory negligence as to the railway company.
4. Whether, under the circumstances of this case, the railway company was negligent in shunting the car in upon the private track without warning, and whether plaintiff was guilty of contributory negligence in attempting to cross the track as he did, were questions for the jury.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed as to one defendant; reversed as to the other.*

Action for a personal injury. The claim of plaintiff was that, while performing his duties as an employee of defendant brewing company, driving a span of horses attached to a wagon in which he was riding and with due care in the act

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of crossing a railway track owned by said brewing company; but maintained and operated by the defendant railway company, through their joint negligence the wagon was struck by a car and he was thereby thrown violently to the ground and injured. The pleadings put such claim in issue. The evidence was to this effect: The track where the injury occurred was used exclusively for the brewery business. It was intersected by an alley leading out from between the company's buildings in such a manner that a person driving a team into or out of such alley, in pursuit of the company's business, had to cross such track. In driving out of the alley one would come directly upon the track without opportunity to see efficiently along the same in the direction from which cars were liable to be shunted for use by the company. That was liable to happen at any time. Driving in either direction was also a frequent circumstance in doing such work for the brewing company, as plaintiff was engaged in. Prior to March 16, 1910, he had been in the employ of the company doing such work for a considerable length of time. He was perfectly familiar with the whole situation and the probabilities as to movement of cars. So far as he knew the brewing company's employees had always been accustomed to rely upon their own care in crossing the track. No one had been injured, to his knowledge, at the particular place, prior to the instance in question. The circumstances leading up to the injury complained of were common to his knowledge. He, in regular course, drove out of the alley. He did not expect there would be any one stationed at the track to warn him as to whether there was a coming car. He asked another teamster whom he met if the way was clear and was assured in the affirmative. Relying thereon he proceeded without looking. He had very little opportunity as he approached the track to observe or hear a car coming in time to avoid it, except by making some special effort to that end.

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He proceeded into the danger zone, and a car came on and did the injury before he could avoid it. There was no one riding in on the car. It was shunted in by the railway company, leaving persons about to come out of the alley to their own vigilance to avoid being injured.

In the state of the case indicated, the trial court decided that plaintiff assumed the risk and directed a verdict of no cause of action. Judgment was rendered for both defendants on such verdict.

For the appellant there was a brief by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.*

For the respondent *Joseph Schlitz Brewing Company* there was a brief by *Doe, Ballhorn & Wilkie,* and oral argument by *J. B. Doe.*

For the respondent *Chicago, Milwaukee & St. Paul Railway Company* there was a brief by *C. H. Van Alstine* and *H. J. Killilea,* and oral argument by *Mr. Van Alstine.* They cited *Kraczek v. Falk Co.* 142 Wis. 570, 126 N. W. 30; *Seaboard A. L. R. Co. v. Horton,* 233 U. S. 492, 34 Sup. Ct. 635, 639; *Schlemmer v. B. R. & P. R. Co.* 205 U. S. 1, 12, 27 Sup. Ct. 407; *Marquette, H. & O. R. Co. v. Spear,* 44 Mich. 169, 6 N. W. 202; *Central Vt. R. Co. v. Bethune,* 206 Fed. 868, 875; *Arkansas S. W. R. Co. v. Wingfield,* 94 Ark. 75, 126 S. W. 76; *St. Louis S. W. R. Co. v. Jackson,* 93 Ark. 119, 124 S. W. 241; *Boehm v. A. C. R. Co.* 174 Fed. 302; *Radley v. Knepfly* (Tex. Civ. App.) 124 S. W. 447; *Philbrick v. West Gardiner,* 105 Me. 164, 73 Atl. 1002; *Dunn v. Cavanaugh,* 185 Fed. 451.

MARSHALL, J. The trial court decided this case, regardless of whether either of the respondents violated duty as to the personal safety of appellant, upon the theory that he assumed the risk which resulted in his injury, and that the

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railway company, with which he had no contract relations, was relieved by such assumption the same as the brewing company.

The undisputed evidence shows a very clear case of assumption of the risk. Plaintiff—in working for the brewing company with full knowledge of the custom of shunting cars across the alley intersection with the railway track without warning, either by the railway employees or any one provided by the brewing company—voluntarily subjected himself to that danger. Such voluntary act, in the relations between master and servant, is denominated assumption of the risk. By the common law, which had not been varied by statute, when the accident happened, so as to abolish the defense of assumption of the risk, a master may conduct his business as he sees fit, subject to the legal consequences. His employees are presumed to assume all the risks which are ordinarily incident to their work, and, in the absence of special circumstances not material to this case, one must be assumed to be familiar with such dangers and also all unusual dangers which are obvious or known to him and he voluntarily subjects himself to. As indicated, at the time of the injury this common-law rule was in full force, and entitled the brewing company to the decision complained of.

Whether the assumption of risk as to the brewing company, applies to the railway company, is a question of more importance than the learned trial court seems to have thought.

It has often been said by this court, that assumption of the risk is a form of contributory negligence; but that does not mean there is no distinction between the two. The former, in the technical sense, can only exist, as an incident of contractual relations. Being a purely voluntary act, it does not involve violation of duty by the employee, for one is at liberty to subject himself to danger if he sees fit, and, if he does so, in the absence of some written law to the contrary, it is at his own risk. Contributory negligence on the contrary, is a vio-

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lation of a common-law duty; and there is the distinction between what may be said to be the two forms of negligence. One may be negligent in voluntarily subjecting himself to the dangers of work, as the master sees fit to carry it on, which are out of the ordinary; but that is matter of his own concern. *Dodge v. Kaufman,* 152 Wis. 171, 176, 139 N. W. 741. It does not involve violation of any legal duty. But contributory negligence, strictly so called, springs from such a violation. So the former, in the strict sense, only arises as an incident of contractual relations, while the latter in such sense, does not so arise. The two are treated as distinct in the written law, in that one as a defense by some legislative enactments, has been taken away and the other preserved.

Thus it was said of ch. 303, Laws of 1905, that it takes away the defense of assumption of the risk, in certain cases specified, but not that of contributory negligence. *Pulk v. Churchill,* 146 Wis. 477, 131 N. W. 906. Also the court has held that assumption of the risk and absence of contributory negligence may co-exist. *Campshure v. Standard Mfg. Co.* 137 Wis. 155, 118 N. W. 633; *Van Dinter v. Worden-Allen Co.* 153 Wis. 533, 138 N. W. 1016, 142 N. W. 122; *Murray v. Paine L. Co.* 155 Wis. 409, 415, 144 N. W. 982.

In the first case cited a pretty complete history is given of the identification, in the decisions of this court, of assumption of the risk with contributory negligence, and it is quite clearly shown that apparent confusion grows out of the treatment of the two in one class in respect to equivalency as a defense, and the features of there being the act of the injured person himself. It is said that real identity has never been asserted and does not exist; but on the contrary that a distinction has always been recognized. That is strikingly apparent in the legislative dealing with the two matters. It is likewise apparent by the fact that, in decisions of this court where assumption of the risk has been dealt with as an efficient defense, it has invariably been between employer and

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employee. The logical distinction between the two has not been often stated here. It has been many times pointed out elsewhere to be that, in contributory negligence there is inadvertence, strictly so called, in stepping aside from a legal duty one owes to himself, while in assumption of the risk there is a voluntary subjection to the risk as an express or implied incident of the contract. 1 Words & Phrases, 589. It is not difficult to see that the two may co-exist, as between employee and employer, and absence of one and presence of the other may also co-exist, and that assumption of the risk, in its technical sense, does not apply as between persons having no contractual relations.

We might support the foregoing by numerous citations from foreign adjudications and text-books. We venture to say there is harmony, in general, on the subject. It is thought that the clear logic of the matter and the manner of dealing therewith in the written and unwritten law of this state, renders support elsewhere unnecessary.

We have not failed to consider, carefully, the interesting presentation by counsel for the railway company, supporting the idea that assumption of the risk and contributory negligence are practically synonymous; but neither loose expressions here and there, nor individual judicial declarations, now and then, by eminent men, make the law as it must be considerately stated in harmony with our judicial system, when a question in respect thereto arises. Unless that is comprehended and adhered to, there would be few reliable rules in respect to matters which have some points in common. That is well illustrated by the declaration in *Central Vt. R. Co. v. Bethune,* 206 Fed. 868, 875, that assumption of the risk does not, in any sense, rest in contract but rests "in a rule of common sense;" while in *Seaboard A. L. R. Co. v. Horton,* 233 U. S. 492, 34 Sup. Ct. 635, the distinction between assumption of the risk and contributory negligence is said to be simple, though sometimes overlooked, and is stated

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as here. Judges who have overlooked such distinction have done so, mainly, it seems, because the conduct involved, whether called one name or the other, is practically the same, in the absence of written law to the contrary, as regards efficiency for defense though, as indicated, the federal supreme court has declared, as the fact is, that there is a distinction and that it is plain and simple.

Perhaps it might be said that our own court is not free from fault as to the confusion referred to. *Koepcke v. Wis. B. & I. Co.* 116 Wis. 92, 92 N. W. 558. The court did not intend there to decide that the fault, denominated contributory negligence, and the voluntary act pursuant to consent as between employer and employee and not so involving fault at all, in a legal sense, denominated assumption of the risk, are synonymous; only that the latter does not have that distinct element of contract which a minor has not competency to make, but so far falls within the pale of contributory negligence, as regards matter of defense, as to be efficient where the assumption is by a minor, as well as in other cases. If any idea inconsistent with this is found there it is plainly superseded by the general review of the subject in *Campshure v. Standard Mfg. Co.* 137 Wis. 155, 118 N. W. 633.

So the assumption of risk between appellant and the brewing company was not that, nor, necessarily, contributory negligence as to the railway company. There was no violation of duty in the former relation. Appellant may have submitted to the danger, as to the brewing company, because of the duty of the railway company to exercise ordinary care not to unreasonably imperil his safety. Duty of the brewing company, in respect to the matter, was superseded by the implied agreement to take the risk. Duty in respect to such matter on the part of the railway company, was not so superseded. The relations between the former did not absolve the railway company from its obligations to exercise ordinary care. As to it, the assumption of the risk is immaterial, ex-

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cept, perhaps, as regards the quality of vigilance requisite to ordinary care.

The evidence is undisputed that the manner in which the car was shunted across the intersection of the way out of the alley and the railway track, was very dangerous to persons lawfully using such way. No precautions whatever were taken for their safety. Assuming that the railway company knew users of the way were aware of the custom of moving cars and, in general, that they looked out, efficiently, for their own safety, and even were bound to do so as regards the brewing company, and, still, it seems that whether it breached its duty or not was, at least, a jury question.

If appellant had taken no precautions to guard against the danger he would clearly have been guilty of contributory negligence. But according to his testimony, just before entering the zone of danger, he asked a co-employee who had just emerged therefrom, driving into the alley, if everything was "O. K." and the reply came, "Yes, no car there," and then that he proceeded and, in an instant or two, was in the pathway of a moving car which he heard coming around the corner from a point outside of his line of sight, and made the best effort he could to get off the track; that he did not hear the car in time to avoid it owing to noises from operations in the vicinity. Under those circumstances it seems that whether he exercised due care was for the jury. Probably the trial court would have so decided had it been appreciated that assumption of risk which was fatal to plaintiff's claim against the brewing company, did not involve characteristics necessarily fatal as to the railway company.

By the Court.—The judgment as to respondent brewing company is affirmed with costs; and as to respondent railway company it is reversed with costs, and the cause remanded for a new trial.

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SCHMIDT, Plaintiff in error, vs. THE STATE, Defendant in error.

October 31—November 17, 1914.

Criminal law: Homicide: Set-guns: Degree of offense: Manslaughter: Murder in second degree: Statute construed: "Any other purpose:" Instructions to jury.

1. Where all the elements necessary to constitute the offense of setting a gun under sec. 4394, Stats., existed, and the death of a person was caused by the discharge of such gun, the homicide cannot be deemed justifiable or excusable but is at least manslaughter in the second degree; and the killing of a person by means of a set-gun may be a higher crime, depending on the intent of the person setting it or other facts characterizing the act.
2. Setting a gun to frighten boys who were likely to enter the premises for the purpose of stealing apples is within the terms of sec. 4394, Stats., which makes it an offense to set a gun "for the purpose of killing game of any kind . . . or for any other purpose."
3. Where, upon the undisputed evidence, the defendant was at least guilty of manslaughter in the second degree under sec. 4394, Stats., there was no error in excluding from the jury's consideration any crime of less degree; nor, there being evidence tending to show that the offense was of higher degree, was it error to charge that defendant was guilty of some crime and that it was for the jury to determine of which crime he was guilty.
4. In such a case it was not error to charge: "The jury have the power, if they see fit, to acquit the defendant of all crime, but in case you should do so you would disregard the undisputed facts and the law applicable to this case."
5. Defendant having set a gun in his orchard in such a way that its contents would probably be discharged against any person coming in contact with a wire attached to the trigger and extended for some distance near the ground, and there being evidence of malice, deliberation, depravity of mind evincing disregard for human life, and intent to injure whoever might enter the orchard for the purpose of stealing apples, a conviction of murder in the second degree under sec. 4339, Stats., is sustained.

TIMLIN, J., dissents.

ERROR to review a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

For the plaintiff in error there were briefs by *Brown, Pradt*

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& Genrich, and oral argument by *L. A. Pradt* and *F. W. Genrich.*

For the defendant in error there was a brief by the *Attorney General, Edward P. Gorman,* district attorney, and *M. B. Rosenberry,* assistant district attorney, and oral argument by *Mr. Rosenberry.*

KERWIN, J. The information in this case charged the plaintiff in error, hereinafter called defendant, with murder in the first degree of one George Kramer. The jury found the defendant guilty of murder in the second degree and judgment was entered accordingly. The case is here on writ of error.

The evidence shows that the defendant set a gun in his orchard loaded with powder and No. 3 shot, cocked, with a wire attached to the trigger of the gun, running back over a spool and then extending along in range with the barrel of the gun and for some distance in front of the muzzle and about eight inches from the ground, so that contact with the wire would be likely to discharge the contents of the gun against any person coming in contact with the wire. The deceased seeing the wire took hold of and pulled it and received the charge of shot in his left hip and left arm at the elbow, from the effects of which he died some time thereafter.

The case was submitted to the jury upon the following grounds: (1) Whether defendant was guilty of murder in the first degree; (2) whether defendant was guilty of murder in the second degree; and (3) whether the defendant was guilty of manslaughter in the second degree.

The following errors are assigned:

"1. The court erred in refusing to give the instructions to the jury upon manslaughter in the fourth degree requested by the defendant.

"2. The court erred in refusing to give the instructions to the jury upon excusable homicide requested by the defendant.

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"3. The court erred in charging the jury that the defendant was guilty of some crime; that it was unlawful for the defendant to set the gun as he did, and that if such setting of the gun caused the death of George Kramer, then the defendant was guilty of some degree of murder or manslaughter. And in charging the jury that the facts in the case, in any view of them, forbid the conclusion that the killing of George Kramer by the set-gun in question was either justifiable or excusable. And in charging the jury that they had the power, if they saw fit, to acquit the defendant of all crime, but in case they should do so they would disregard the undisputed facts and the law applicable to this case. And in submitting, by the charge, to the jury the consideration only of the question whether the defendant was guilty of murder in the first degree or in the second degree, or manslaughter in the second degree. And in charging the jury at all upon the subject of murder in either the first or second degree, or manslaughter in the second degree. And in charging the jury that they should find the defendant guilty of manslaughter in the second degree if they did not find him guilty of murder in either the first degree or in the second degree.

"4. The court erred in denying the motion of the defendant to set aside the verdict and for a new trial."

The first three assignments of error may be treated together. There was no error in refusing to give the instructions to the jury on manslaughter in the fourth degree or upon excusable homicide. The court instructed the jury that they might consider only the question of murder in the first degree, murder in the second degree, and manslaughter in the second degree.

The argument of counsel for defendant is that the court erred in refusing to instruct on manslaughter in the fourth degree and excusable homicide. It is insisted that because one might set a gun for the purpose of committing murder and hence be convicted of murder upon a proper showing though committed by a set-gun, by parity of reasoning it follows that where death results from the discharge of a set-gun it would be proper to show, for the consideration of the jury, facts relating to its setting that might lead them to the conclusion that

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the defendant was guilty of some degree of manslaughter or homicide less than manslaughter in the second degree fixed by the set-gun statute.

It is quite true that a gun might be set for the purpose and with the intent to commit murder, and upon conviction of murder punishment should not be confined to manslaughter in the second degree, but for the degree of murder found, and therefore it was proper upon the evidence in the present case to submit to the jury upon sufficient evidence the two degrees of murder. But it does not follow that because murder may be committed by means of a set-gun the defendant may escape with a lighter punishment than for manslaughter in the second degree where all the elements necessary to constitute the offense of setting a gun under sec. 4394, Stats., are proved, and death is caused by the discharge of such gun.

Whether punishment in case of death by a set-gun could in any case be reduced below manslaughter in the second degree we need not here determine, for we are convinced that upon the undisputed facts in the instant case the court below was clearly right in refusing to submit a lower degree of manslaughter or homicide. The statute provides:

"Section 4394. Any person who shall set or fix in any manner whatever any gun, pistol or other firearm, or any spring gun for the purpose of killing game of any kind by coming in contact therewith or with any string, wire or other contrivance attached thereto, by which the same may be discharged, or for any other purpose, shall be punished by imprisonment in the state prison not less than six months nor more than three years; and if the death of any person is caused thereby he shall be deemed guilty of manslaughter in the second degree."

It is argued that the evidence shows that the gun was set to protect property and frighten boys who were likely to enter the premises for the purpose of stealing apples, and that such purpose does not fall within the provisions of the above section. The statute applies to setting a gun for the purpose of

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killing game, *"or for any other purpose."*. Setting a gun to frighten boys is within the terms of the statute.

It is plain that the object of the legislature in passing this statute was to prevent the setting of guns which might inflict injuries and be dangerous to life or limb, and in case persons violating the statute thereby caused the death of a human being they should be held guilty of manslaughter in the second degree, though the gun was set for an innocent purpose. The statute forbids the setting of a gun for the purpose of killing game, "or for any other purpose." The intent of the legislature was to prevent the setting of guns generally. The words "or for any other purpose" were evidently not intended to have their general meaning disassociated from the context of the statute, because such a meaning would include intentional and all other felonious killing of a human being, which the legislature manifestly did not contemplate. Reading the words "or for any other purpose" in their connection with the other parts of the statute, their meaning naturally is to be construed as if it read "for any other similar purpose," that is, a purpose other than where there was a design to effect the death of or physical injury to another, or the wrongful destruction of property, as well as where a gun was set with a purpose evincing a depraved mind regardless of danger to human life. In these latter cases, if death results from the setting of the gun the killing would come within the law regulating homicides, but where such death is not one of these, then the statute makes it manslaughter in the second degree and it cannot be less. So if the defendant merely purposed to frighten boys, and that was an innocent purpose, then he was guilty of manslaughter in the second degree and could not be convicted of a lesser offense.

The court below proceeded upon the theory that if the jury failed to find the defendant guilty of a higher degree of offense than that prescribed by sec. 4394, Stats., he should be con-

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victed of manslaughter in the second degree as prescribed by the statute. In this view we think the court was correct. The evidence is undisputed that the defendant was at least guilty of manslaughter in the second degree as prescribed by sec. 4394, and therefore it was not error to refuse to submit to the jury a lower degree of manslaughter or homicide.

The evidence shows that the defendant deliberately set the gun, he says, to frighten boys coming into the orchard to steal apples. But it was so set as to discharge its contents into any person going to the apple tree and coming in contact with the wire attached to the trigger of the gun.

Counsel for defendant contend that the defendant had a right to set the gun for the purpose of protecting his property, if there was no intent to commit any offense. But the statute makes the setting of the gun an offense regardless of whether it was set with intent to do injury to another or not. Counsel complain of the following parts of the charge:

"If you should have a reasonable doubt from the evidence in this case that the defendant did not intend to kill any human being by means of the gun and apparatus which he set in his orchard, and if you should also have a reasonable doubt that the act of setting the gun and adjusting the apparatus did, under all the circumstances in which the defendant acted, constitute an act imminently dangerous to others and evincing a depraved mind regardless of human life, and should believe from the evidence that the defendant intended only to frighten persons who might come into his orchard, yet that he nevertheless produced the death of George Kramer, then you should find the defendant guilty of manslaughter in the second degree."

"Upon the undisputed facts in this case it is clear that the defendant is guilty of some crime, and it is for the jury to determine of which crime he is guilty."

"It was unlawful for the defendant to set and fix the gun in question loaded, cocked, and adjusted with the apparatus for firing the same in the manner and place in which he admits he did set and fix it, and if by so setting and fixing the gun in question he produced the death of George Kramer in

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the manner in which has been testified to on this trial, then the defendant is guilty of some degree of murder or manslaughter."

"If the defendant set and fixed and adjusted the gun in question solely for the purpose of scaring away trespassers and without intent to physically injure them, he thereby committed a crime under this statute, and if he thereby produced the death of a human being the crime was so much more serious. If in setting, fixing, and adjusting said gun and apparatus he intended to kill any human being or to seriously injure any human being, that is, do him great bodily harm, then the defendant, in causing the death of George Kramer by means of said gun and apparatus, became guilty of some degree of murder or manslaughter."

"But the facts in this case, in any view of them, forbid the conclusion that the killing of George Kramer by the set-gun in question was either justifiable or excusable."

"The jury have the power, if they see fit, to acquit the defendant of all crime, but in case you should do so you would disregard the undisputed facts and the law applicable to this case."

There was no prejudicial error in the parts of the charge complained of. The undisputed evidence shows that the defendant violated the statute in setting the gun. The learned trial judge below in charging the jury said:

"A large share of the facts involved in this case are not in dispute. It has been proved without dispute that on August 24, 1913, about noon, George Kramer, a young man in the eighteenth year of his age, while on the premises of the defendant, *William Schmidt,* in this county, and in an orchard on said premises, came in contact with a wire stretched horizontally a little above the ground and thereby discharged a loaded shot gun which had been set and affixed to stakes in the orchard and received a large share of the contents of said loaded gun in his left thigh between the knee and the hip and in his left arm, above and below the elbow, and thereby he was seriously wounded; that without ever recovering therefrom the said George Kramer died on or about November 4, 1913, and that the primary cause of his death were the gunshot wounds in question; that the defendant *Schmidt* had two

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days before the shooting loaded said gun, taken it to said orchard, and set and fixed the same in place in the orchard where it was at the time when it was discharged and fixed and adjusted a wire or wires extending from the trigger of the gun for a considerable distance so adjusted that contact with the wire would pull the trigger and cause the discharge of the gun; and that said gun was partly concealed where it was set by means of three old wash boilers set up at the sides and above as described in the evidence."

This is a fair statement of the evidence upon the points covered. In addition to this there was evidence of malice, deliberation, depravity of mind evincing disregard for human life, and intent to injure whoever might enter the orchard for the purpose of stealing apples. Under these circumstances there was ample evidence to support the verdict of the jury under sec. 4339, Stats., which provides:

"Such killing, when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, without any premeditated design to effect the death of the person killed or of any human being, shall be murder in the second degree."

And the evidence being undisputed that defendant was guilty of manslaughter in the second degree under sec. 4394, Stats., there was no error in the charge in that regard. *Cupps v. State,* 120 Wis. 504, 522, 97 N. W. 210, 98 N. W. 546.

Error is assigned because the court below denied a new trial. It is argued that the evidence was not sufficient to support the verdict. We have heretofore referred to the evidence and a recital of it at length would serve no useful purpose. Under this head counsel for defendant discuss the alleged error in the charge relating to manslaughter in the second degree and insist that the jury must have been prejudiced thereby. As before observed, the charge in this respect was correct, and how it could have prejudiced the jury we are unable to see.

Error is also assigned because the court refused to charge

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on excusable homicide and manslaughter in the fourth degree. Sufficient has already been said to show that there was no error in this regard.

The undisputed evidence showing that the defendant was at least guilty of manslaughter in the second degree under sec. 4394, Stats., there was no error in refusal to charge on a lower degree of offense. We are unable to see that there was any error in the charge or refusal to charge.

We have carefully examined the record and find no grounds for a new trial. The record shows that the case was carefully tried by the learned judge below and fairly submitted to the jury, and we discover no prejudicial error in the record.

By the Court.—The judgment is affirmed.

TIMLIN, J. (*dissenting*). I think that under the maxim "*ejusdem generis*" the words "or for any other purpose" found in the set-gun statute (sec. 4394) must be limited to purposes similar to "the purpose of killing game." The purpose of killing game in the proper season is not an unlawful or criminal purpose. Out of season it is unlawful and at no time is it a felonious purpose. But the "other purpose" mentioned in the statute is not by this maxim of construction required to be exactly like the purpose of killing game, but only a purpose of the same class, genus, or family of purposes. The dominant purpose of killing game with a set-gun is either to gain ownership of the hide and carcass or to protect crops or domestic animals against the depredations of game animals. Both of these purposes may concur. The one is to acquire property, the other to protect property already acquired. To protect the cabbage patch against deer, the corn field against raccoons, the wheat field against domestic animals, or the chickens and ducks against foxes, mink, and otters, or the apple crop against boys, are purposes of a similar kind, if there is no intention to do bodily injury to the boys. The law relating to set-guns is well collected in the notes to *State v. Barr*

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(11 Wash. 481, 39 Pac. 1080) 29 L. R. A. 154. Under our statute, if the accused set the gun for any of the purposes above mentioned and if the death in question, although not intended, was caused by his act in so doing, he would be guilty of manslaughter in the second degree. But here there are two questions of fact involved: (1) With what intent was the gun set? (2) Was the death of the boy caused by setting the gun or did it result from some intervening cause? (He was injured August 24, 1913, and died of a hemorrhage from the wound November 4, 1913.) The proper construction of this statute is that it elevates all homicides resulting from a set-gun, where no homicide is intended, to manslaughter in the second degree. But where a gun is set for a felonious purpose and homicide results, the graver crime is not by this statute reduced to manslaughter in the second degree.

The accused was charged with murder in the first degree and convicted of murder in the second degree. Here questions of fact were also involved. Among other instructions the court gave the following to the jury:

"Upon the undisputed facts in this case it is clear that the defendant is guilty of some crime and it is for you to determine of which crime he is guilty. . . . But the facts in this case, in any view of them, forbid the conclusion that the killing of George Kramer by the set-gun in question was either justifiable or excusable. . . . The jury have the power, if they see fit, to acquit the defendant of all crime, but in case you should do so you would disregard the undisputed facts and the law applicable to this case."

This jury had been sworn according to sec. 4692, Stats., to "well and truly try the issue between the state of Wisconsin and the defendant, . . . according to evidence." To me the above instructions are equivalent to directing a verdict of guilty. True, the court gives the jury the alternative of committing perjury, that is, disregarding the undisputed facts and the law applicable to the case, if they choose. If it is to be the law of this state that a trial judge may direct a jury to

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bring in a verdict of guilty in a criminal case, so be it. But until it is authoritatively decided that a judge may do so I cannot bring myself to approve the foregoing instructions upon any pretense that they are not the equivalent of directing a verdict of guilty. I think the judgment should be reversed and a new trial awarded.

REICHERT, Respondent, vs. MILWAUKEE COUNTY, Appellant. ZAUTCKE and others, Respondents, vs. MILWAUKEE COUNTY, Appellant.

October 30—December 8, 1914.

Counties: Liability for interest: Purchase of lands: Delay in payment: Refusal of clerk to issue county orders: When county in default: Approval of abstract of title: Officers: Powers and duties.

1. With reference to liability to pay interest as damages, a county is not upon the same footing as an individual or a private corporation.
2. The powers of county officers derived from the legislature cannot be enlarged, narrowed, or taken away by action of the county board, except as the legislature has authorized such enlargement or limitation.
3. Thus, although the county board is given power to contract and to authorize and require the making and delivery of county orders, and the duty of the county clerk in signing and delivering such orders is ministerial, the clerk may refuse to sign and deliver an order not legally authorized.
4. Every ministerial officer in the performance of purely ministerial acts is required, at his peril, to interpret the statute, or the order made in pursuance thereof, imposing a duty upon him and calling for action on his part. His decision if erroneous does not exempt him from liability in an action, but if correct is sufficient to defeat an action against him.
5. A resolution of a county board accepting an offer to sell land directed delivery of a county order for the purchase price upon approval by the district attorney of an abstract of title and tender of an approved conveyance. Consummation of the purchase hav-

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ing been temporarily enjoined in a taxpayer's action, when the vendors tendered an approved abstract and conveyance the county clerk refused to issue the order. About five months later, after discontinuance of the injunction suit, the county board again directed issuance of a county order as provided in the previous resolution. The vendors again prepared a conveyance and an abstract brought down to date, but with only the former approval of the district attorney. The clerk, who knew that another taxpayer's action was to be commenced, again refused to issue the order. The second taxpayer's action was begun on that day and notice of *lis pendens* filed. On the next day the district attorney, having found such notice on file, refused to approve the abstract. *Held*, that the second refusal of the clerk to issue the order was proper because (1) knowing of the action to be brought, he had a right to take a reasonable time to investigate and obtain advice in the matter, and (2) the previous approval of the abstract, given five months before, was not sufficient under the resolution of the county board.

6. Pendency of the second taxpayer's suit was a sufficient ground for the refusal of the district attorney to approve the abstract.
7. The vendors, having failed to procure and present a proper approval of the abstract by the district attorney as required by the resolution of the county board, were not entitled to a county order at that time and the county was therefore not then in default nor was it liable to pay interest as damages when, after dismissal of the second taxpayer's action, the purchase was consummated and county orders issued for the purchase price.
8. Although as to one of the tracts to be purchased the resolution of the county board (passed in June, 1907) directed that upon approval of the abstract, etc., a county order be delivered for a part of the purchase price and that the balance be paid "on or before March 1, 1908, with interest at four per cent.," payment of such balance as well as delivery of the county order was conditioned upon approval of the abstract, and such approval not having been obtained prior to the taxpayer's action the county was not liable for interest.

APPEALS from judgments of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

These are separate appeals from two several judgments. The respondent *Reichert* filed with the county board of the appellant county a claim for allowance of interest based upon the facts hereinafter stated, and from a disallowance of that

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claim he appealed to the circuit court, which allowed the claim and gave him judgment thereon. The county appeals to this court. The claim of *Zautcke* and others was of the same kind, took the same course, with the same result. The liability of the county for interest is predicated upon the following facts:

The county board of *Milwaukee County,* acting under authority of ch. 356, Laws of 1903, proceeded to acquire a tract of land as a site for the house of correction. The county advertised for proposals for a farm containing a stone quarry and suitable for the relocation of the house of correction. Among other sites offered was one by *Zautcke* and others of about 210 acres for $115,000, and one by the respondent *Reichert* of about eighty acres, finally offered for $47,320. On June 25, 1907, the county board adopted a resolution to buy these tracts at the figures aforesaid. The respondents had each offered in writing to convey their respective tracts to the county by proper deeds of conveyance free and clear from all valid incumbrances. The resolution accepting this offer contained the following:

"Further resolved, that upon the approval by the district attorney of abstract of title to said lands, offered by said *Johanna Zautcke* and others, and of the form of conveyance of said lands to said county, proposed to be made by them, and proper tender of said conveyance duly executed by said *Johanna Zautcke* and others, a county order in due form be delivered to said *Johanna Zautcke* and others, or their properly authorized attorneys, for the sum of one hundred and fifteen thousand ($115,000) dollars."

A like resolution was adopted concerning *Reichert's* tract, except that the county order to him was required to be for the sum of $35,000, and that the further sum of $12,320 was to be paid to him on or before March 1, 1908, with interest at four per cent. On July 10, 1907, one T. J. Neacy began a taxpayer's suit against the vendors mentioned, the county, and its clerk and treasurer, attacking the attempted

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purchases as illegal on various grounds, and in that suit Neacy obtained a temporary injunctional order restraining the consummation of these purchases. This order remained in force and this taxpayer's suit pending until December 10, 1907, when the suit was discontinued by stipulation of parties, and on December 23, 1907, another like taxpayer's action was begun by Mr. Neacy in which it was sought to rescind these purchases. This last mentioned case was decided against the taxpayer and afterward found its way to this court, where that decision was affirmed. *Neacy v. Milwaukee Co.* 144 Wis. 210, 128 N. W. 1063. While this first taxpayer's action was pending and the injunctional order in force and on July 13, 1907, as to the *Zautcke* tract, and July 27, 1907, as to the *Reichert* tract, the district attorney by written communication to the county clerk approved the title of the vendors with some provisions relative to the release of outstanding mortgages on the *Zautcke* tract, and closed his approval with this condition: "Provided no additional conveyances or incumbrances shall have been recorded at the time the purchase is consummated." On July 27, 1907, each of the vendors tendered to the county clerk an abstract of title brought down to that date, together with executed deeds and releases of mortgages and the writings mentioned containing the approval of district attorney of title and conveyances, and demanded county orders, but the county clerk, believing himself bound by the injunction, refused to issue any county order to either vendor. On December 10, 1907, after the discontinuance of the injunction suit, the county clerk asked the district attorney for advice respecting his duty to issue county orders under the resolution of June 25th, above quoted. December 11, 1907, the district attorney advised the clerk in writing to the effect that the *Zautcke* resolution was irregular because it did not name the persons to whom the county orders should issue and that the clerk should await the next meeting of the

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county board, to be held within a few days, when a proper resolution could be passed. Both tracts were to constitute the selected site. December 17, 1907, the county board, then in session, to conform to the last mentioned opinion of the district attorney adopted a resolution as follows:

"Resolved, that the chairman of this board and the county clerk be and they are hereby directed to sign and issue two county orders, one to *Johanna Zautcke* and others (*Amelie Wild, Ellen Heinrich, Laura P. Clinton, Louise Zautcke* and *Frederick J. Zautcke*) and one to *C. K. Reichert* as provided for by the resolution of the Supervisor Jeske, passed by this board on June 25, 1907, and appearing on pages 407 and 408 of the printed proceedings of this board for said day."

December 23, 1907, at the end of the five days provided by statute, each of the vendors again presented to the county clerk an abstract of title brought down to that date and also deeds of conveyance and releases of mortgages and the former approvals of the district attorney of date July 13 and July 27, 1907, and demanded the county orders described in the resolution of December 17, 1907. The county clerk refused to sign or deliver the orders, and the circuit court in the instant cases found that this was because the district attorney had information of the contemplated taxpayer's suit by Mr. Neacy to rescind the contracts of purchase, and we assume such finding to be correct. The uncontroverted evidence, however, shows that the county clerk had in fact another reason, namely, the lack of approval by the district attorney later than July 27, 1907. December 23, 1907, about an hour and a half after the tender to and demand upon the county clerk, Neacy commenced his second taxpayer's suit to rescind the contract of purchase and filed his notice of *lis pendens* with the register of deeds of the county. December 24, 1907, the abstracts and conveyances tendered on the day preceding were by the vendors submitted to the district attorney for approval, and the latter, having found the notice of *lis pendens* on file and the taxpayer's action pending, by written com-

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munication to the county clerk dated December 28, 1907, expressly withheld his approval. January 7, 1908, the county clerk notified the county board in writing of the pendency of the second taxpayer's suit, and the board thereafter in various ways approved of and ratified the action of the county clerk in refusing to execute and deliver the county orders. After the decision in *Neacy v. Milwaukee Co.* 144 Wis. 210, 128 N. W. 1063, the county orders for the principal sum due each of the vendors under the contracts of purchase were issued, delivered, and paid, but under a stipulation that the vendors did not thereby waive their right to recover interest if by law they were entitled to such interest. The *Zautcke* contract contained no provision covering the matter of interest and was for the payment of $115,000. The *Reichert* contract was like the *Zautcke* contract as to the first $35,000, but there was also a provision for a further and deferred payment of $12,320, which it was agreed should bear interest at four per cent. The judgment and findings in the second taxpayer's suit were offered in evidence. It was there found, among other things, that there was no fraud or undue influence which avoided the purchases, but the price agreed to be paid was about $170 per acre above the real value of the land and exorbitant; that the real value of the land was $400 per acre; nevertheless that a valid contract existed between the vendors and the county and that the vendors made the tender of deeds as stated and performed all the covenants on their part to be performed, but that it was the duty of the county clerk to refuse to deliver the county orders to the vendors until the taxpayer's suit was decided. The parties here before the court were parties to the suit in which such findings were made.

The judgments appealed from give each of the respondents interest at the legal rate of six per centum from December 23, 1907.

For the appellant there was a brief signed by *Lyman G.*

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Wheeler, special assistant district attorney, and oral argument by *Mr. Wheeler.* To the point that in performing public functions a county cannot be mulcted in damages because some elective or appointive officer fails to do his duty, he cited 6 McQuillin, Mun. Corp. §§ 2605, 2622 *et seq.;* 4 Dillon, Mun. Corp. (5th ed.) §§ 1636–1640; *Kuehn v. Milwaukee,* 92 Wis. 263, 65 N. W. 1030; *Randles v. Waukesha Co.* 96 Wis. 629, 71 N. W. 1034; *Hawkins v. U. S.* 96 U. S. 689, 691.

For the respondents there was a brief by *Adolph Huebschmann,* attorney for *Reichert,* and *Schmitz, Wild & Gross,* attorneys for *Zautcke* and others, and oral argument by *Mr. Huebschmann, Mr. A. J. Schmitz,* and *Mr. Robert Wild.* They contended, *inter alia,* that a municipal corporation is bound by all contracts which it may legally enter into in like manner as a private corporation or an individual. 20 Am. & Eng. Ency. of Law (2d ed.) 1156, 1157; *Washburn Co. v. Thompson,* 99 Wis. 585, 75 N. W. 309; *Weston v. Syracuse,* 158 N. Y. 274, 53 N. E. 12; *Steffen v. St. Louis,* 135 Mo. 44, 36 S. W. 31; *Murray v. Kansas City,* 47 Mo. App. 105; *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798. As to matters within the scope of their powers and powers of their officers, municipal corporations may be estopped under the same circumstances and upon the same principle as natural persons. *First S. & T. Co. v. Milwaukee Co.* 158 Wis. 207, 148 N. W. 22; *Houfe v. Fulton,* 34 Wis. 608; *Kneeland v. Gilman,* 24 Wis. 39, 42; *Codner v. Bradford,* 3 Pin. 259; *Witter v. Grand Rapids F. M. Co.* 78 Wis. 543, 47 N. W. 729; *Dorner v. School Dist.* 137 Wis. 147, 118 N. W. 353; *Koch v. Milwaukee,* 89 Wis. 220, 228, 62 N. W. 918; *McGillivray v. Joint School Dist.* 112 Wis. 354, 367, 88 N. W. 310; *Mills v. Gleason,* 11 Wis. 470; *Balch v. Beach,* 119 Wis. 77, 83, 95 N. W. 132; *Uncas Nat. Bank v. Superior,* 115 Wis. 340, 351, 91 N. W. 1004; *Monroe W. W. Co. v. Monroe,* 110 Wis. 11, 85 N. W. 685; 16 Cyc. 781; *Thomson v. Elton,*

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109 Wis. 589, 593, 85 N. W. 425. In this state interest is allowed on contract obligations, not as a penalty, but as compensation for the retention by the debtor of money to which the creditor was entitled. *Laycock v. Parker,* 103 Wis. 161, 79 N. W. 327; *J. I. Case P. Works v. Niles & S. Co.* 107 Wis. 9, 82 N. W. 568; *Remington v. E. R. Co. of Minn.* 109 Wis. 154, 84 N. W. 898, 85 N. W. 321; *Shaw v. Gilbert,* 111 Wis. 165, 86 N. W. 188. That counties are liable for interest upon contract has been held in the following cases: *Land, L. & L. Co. v. Oneida Co.* 83 Wis. 649, 53 N. W. 491; *Rice v. Ashland Co.* 114 Wis. 130, 89 N. W. 908; *Spooner v. Washburn Co.* 124 Wis. 24, 102 N. W. 325. Against a city: *Kluender v. Milwaukee,* 57 Wis. 636, 15 N. W. 805; *Pruyn v. Milwaukee,* 18 Wis. 367; *Milwaukee v. Milwaukee Co.* 114 Wis. 374, 90 N. W. 447; *Appleton W. W. Co. v. Appleton,* 136 Wis. 395, 117 N. W. 816; *Eau Claire v. Eau Claire W. Co.* 137 Wis. 517, 541, 119 N. W. 555. As against a town: *Mills v. Jefferson,* 20 Wis. 50; *Packard v. Bovina,* 24 Wis. 382.

TIMLIN, J. These cases are argued by counsel for respondents and seem to have been decided by the court below upon the hypothesis that a county which is party to a land contract is under the same liability to pay interest as damages for delay as is a natural person under similar circumstances. This is erroneous. Indeed, there is a respectable array of authority to the effect that a county, being merely an arm or agency of the state, has, at least when carrying out a function of the state, the same exemption from liability for interest as has the state. *Seton v. Hoyt,* 34 Oreg. 266, 55 Pac. 967, 43 L. R. A. 634, 75 Am. St. Rep. 641; *Garland Co. v. Hot Spring Co.* 68 Ark. 83, 56 S. W. 636; *Clay Co. v. Chickasaw Co.* 64 Miss. 534, 1 South. 753; *National Bank v. Duval Co.* 45 Fla. 496, 34 South. 894; *Madison Co. v. Bartlett,* 2 Ill. 67, and subsequent Illinois citations.

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Our court, however, has never gone so far, but has recognized the liability of a county to pay interest as damages in certain cases. In *Alexander v. Oneida Co.* 76 Wis. 56, 45 N. W. 21, it was held that proof of neglect to pay a county order after a proper demand and refusal did not authorize a court to award interest as damages against a county. In *Land, L. & L. Co. v. Oneida Co.* 83 Wis. 649, 53 N. W. 491, it was held that the county board might allow the towns in that county interest on the amounts due to such towns from the county. In *Mueller v. Cavour,* 107 Wis. 599, 83 N. W. 944, interest against a county was denied on a county order. In *Rice v. Ashland Co.* 114 Wis. 130, 89 N. W. 908, interest was allowed against the county in an action for money had and received. In *Spooner v. Washburn Co.* 124 Wis. 24, 102 N. W. 325, interest was allowed after demand and refusal in an action upon an account by a town against the county. In *Rider v. Ashland Co.* 87 Wis. 160, 58 N. W. 236, interest against a county was allowed *sub silentio.* In *Quigg v. Monroe Co.* 134 Wis. 122, 113 N. W. 723, the question is left in doubt. In *Voigt v. Milwaukee Co.* 158 Wis. 666, 149 N. W. 392, where a statute authorized a recovery of damages against a county, it was held that this carried interest on such damages from the time when inflicted.

The legal character of a county is set forth and prior decisions in this state bearing upon the subject collected in *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798. 1 Dillon, Mun. Corp. §§ 23 and 25, is quoted in support of the following: "They are purely auxiliaries of the state; and to the general statutes of the state they owe their creation, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject." The last member of this compound sentence is not strictly accurate. If it were it would dispose of this case at once, for there is no statute imposing any liability upon the county for interest in such case. Sec. 686,

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Stats., requires claims against the county to be allowed by the county board, which shall direct a county order to be drawn on the treasurer in favor of the claimant. No such order, except for the per diem and mileage of the members of the board, is to be drawn within five days after the allowance of the claim, and no interest shall ever be paid by any county on its orders. Sec. 685 provides that upon trial in the circuit court of an appeal from a resolution of the county board rejecting a claim, no interest shall be recovered by the plaintiff upon any sum allowed by the county board and for which orders were drawn. Sec. 676 provides that no action shall be brought or maintained against a county upon any account, demand, or cause of action when the only relief demandable is a judgment for money, unless the county board shall consent and agree to the institution of such action, or unless such claim shall have been duly presented to the board and the board shall have failed to act upon the same within the time fixed by law. But it is therein provided that no action shall be brought upon any county order until the expiration of thirty days after a demand for the payment thereof has been made. Because another statute requires that all judgments bear interest, and apparently in order to prevent transforming a county order into a judgment so as to make it bear interest, it is further provided that if an action be brought on a county order and the county fails to appear and there is no proof of such thirty-day demand, the court, or the clerk thereof, shall not permit judgment to be entered, and if judgment be entered thereon the judgment shall be absolutely void. It was said in *Mueller v. Cavour*, 107 Wis. 599, 83 N. W. 944, that interest is not recoverable upon town or county orders, the former by common law, the latter by common law and statute. Town orders have been considered in *Packard v. Bovina*, 24 Wis. 382; *Brown v. Jacobs*, 77 Wis. 29, 45 N. W. 679; and *Marvin v. Jacobs*, 77 Wis. 31, 45 N. W. 679.

These statutes and decisions furnish very significant indi-

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cations that a county, with reference to liability for interest, is not on a par with a natural person or with a private corporation. In the case of a natural person failing in a suit for rescission, as this county did in *Neacy v. Milwaukee Co.* 144 Wis. 210, 128 N. W. 1063, equity would have closed the controversy then and there by decreeing a recovery of the purchase money with or without interest, as the case might be, and the question of the liability of the purchaser for interest would in that suit have been finally adjudicated. There are essential differences between a county and a private corporation or a natural person relative to liability for interest or damages which cannot be disregarded. The county acts through its officers as agents, but agents not of its own choice or creation. These officers are agents who represent the county in the transaction, but have their authority conferred and limited by act of the state through its legislature. Each has his appointed field of action, not created, limited, or expanded by act of the county or by usage or by contract obligations. Within the scope of the authority conferred by the legislature the county, through its board of supervisors, may by its acts arouse official action and official duties upon the part of other county officers, but the powers of the latter derived from the state legislature may not be taken away or narrowed by action of the county board nor enlarged except in cases in which the legislature has authorized such limitation or enlargement. For illustration: Although the county board is given power to contract and to authorize and require the making and delivery of county orders, and the duty of the county clerk in signing and delivering such orders is ministerial (*State ex rel. Treat v. Richter,* 37 Wis. 275), the clerk may refuse to sign and deliver an order not legally authorized (*State ex rel. Mulholland v. County Clerk,* 48 Wis. 112, 4 N. W. 121), and if he fail to take objection in such case the treasurer may refuse to pay such order after it is issued and delivered (*Doyle v. Gill,* 59 Wis. 518, 18 N. W. 517).

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Every ministerial officer in the performance of purely ministerial acts is required, at his peril, to interpret the statute, or the order made in pursuance thereof, imposing a duty upon him and calling for action on his part. His decision if erroneous does not exempt him from liability in an action, but his decision if correct is sufficient to defeat an action against him. When on December 23, 1907, the tender of conveyances with abstracts brought down to date and the five-months-old approval of the district attorney was made to the county clerk and a county order demanded, he had two reasons for refusing to issue it, each of which was sufficient. (1) He knew of the taxpayer's suit about to be commenced against him and against the vendors and the county and he was under no obligation to join in a scramble to get out this county order ahead of the taxpayer's suit, but might take a reasonable time to investigate and take counsel in the matter. One day's time for that purpose would not be unreasonable. (2) He had a right to interpret and did interpret correctly the resolution of the county board requiring the approval of the district attorney. This condition of his issuing the order was not satisfied by an approval five months old, even though the abstract were continued down to date. There must have been a certificate of its continuance down to date which the district attorney had never seen. The clerk was not obliged to take the chances of the death, marriage, or insanity of one of the grantors occurring during the five months in question and not yet made a matter of record. Nor was he required to take the chances of unrecorded conveyances to purchasers in possession who might have come in during said five months. He was not required to pass upon the sufficiency of the certificate of the abstractor made and annexed since the district attorney had seen the abstract and relating to the abstract as brought down to date. The responsibility of determining the sufficiency of the title was by the resolution of the county board not cast on him but upon the district attorney. The

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statute made the district attorney the advisor of the board. Sec. 752, Stats. The county board had power to purchase this land, to be paid for subject to the district attorney's approval of the abstract of title and the conveyances. The clerk promptly sought the advice of the district attorney, and the latter on December 28, 1907, refused to approve the title or conveyance on account of the then pending taxpayer's action. This was sufficient ground for the refusal of the district attorney to approve of the abstract of title and the tendered conveyance. The respondents having failed to present to the county clerk such approval by the district attorney as the resolutions of June 25th and December 17th, properly interpreted, required, were not entitled to a county order at that time, and the county was not in default or liable to pay interest as damages. The county had discretion to withhold approval, acting in this through the district attorney. It is also noteworthy that if the respondents had received the county orders demanded on December 23, 1907, they could collect no interest on such orders and could not sue on them for thirty days, and then would have to meet the taxpayer's suit for a rescission. This alone would show the judgments appealed from to be erroneous, at least as to thirty days' interest. But we prefer to rest the case on the broader ground that the respondents failed to comply with the resolution of the county board properly interpreted, and procure an approval of the district attorney such as those resolutions required. This will result in the dismissal of *Zautcke's* case with costs. The county was not in default, hence cannot be required to pay interest as damages. The *Reichert* claim in part rests upon slightly different grounds. As to the interest on $35,000 of his claim it is identical with the *Zautcke* claim. These resolutions requiring approval by the district attorney were contained in and part of the resolution of the county board accepting the offers of *Zautcke* and others and *Reichert*. There was therefore no performance upon the part

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of either of those vendors until they complied with these resolutions. As to *Reichert* the first resolution reads as follows:

"That upon the approval by the district attorney of abstracts of title to said lands, offered by the said *Conrad K. Reichert,* and of the form of conveyance of said lands to said county, proposed to be made by him, and proper tender of said conveyance duly executed by said *Conrad K. Reichert,* a county order in due form to be delivered to said *Conrad K. Reichert,* or his properly authorized attorney, for the sum of thirty-five thousand ($35,000) dollars be, and that the further sum of twelve thousand three hundred and twenty ($12,320) dollars be paid to said *Conrad K. Reichert* on or before March 1, 1908, with interest at four per cent."

The payment of this sum as well as the delivery of the county order was conditioned upon the approval of title and conveyance by the district attorney as stated. This approval was not obtained as stated, nor an abstract and conveyance with such approval tendered, nor was the approval unlawfully withheld, hence the $12,320 with interest thereon at four per cent. did not become due to *Mr. Reichert* on December 27, 1907, or at any time prior to the disposition of the taxpayer's suit. It follows that the judgment in favor of *Reichert* must also be reversed with costs and his case dismissed.

By the Court.—It is so ordered.

SIEBECKER, KERWIN, and BARNES, JJ., dissent.

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TYRE, Appellant, vs. KRUG and others, Respondents.

October 31—December 8, 1914.

Pleading: Joinder of causes of action: Schools: Use of buildings for private business: Powers of school boards.

1. **Under sec. 2647, Stats., a cause of action for damages in favor of plaintiff personally cannot properly be united with a cause of action in favor of himself and all other taxpayers similarly situated, as a class, to restrain certain acts of public officers or employees.**
2. **The school board in a city of the first class has no authority, either under sec. 8, ch. 459, Laws of 1907, or under sec. 435e, Stats., to permit school principals to use the school buildings for the purpose of conducting private school-book and supply businesses for their personal profit; and such use of the buildings may be restrained in a taxpayer's action. WINSLOW, C. J., and VINJE, J., dissent.**

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

The plaintiff brings this suit as a taxpayer against the defendants, who are the principals of five public high schools in the city of Milwaukee. It is alleged that the defendants have been conducting regular stores in the school buildings under their charge and control, wherein they have sold drawing instruments, school books, stationery, and blanks for a profit above the cost of such articles; that they pay no compensation for the use of the buildings for this purpose; that the school board denied the request of the Milwaukee Stationers and Manufacturers Club to prohibit the use of the buildings for this purpose and by a unanimous vote gave its assent that the same should be continued.

It is also alleged that the plaintiff is now and for years has been engaged as a dealer in school books and school supplies and that his income has been diminished by reason of these acts of the defendants. The plaintiff further alleges that his remedy at law is not adequate. He asks judgment for $1,000 damages sustained by him because of the acts of

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the defendants and that the defendants be enjoined and restrained during the pendency of this action and until the further order of the court from making any use of the buildings for the purpose of carrying on this business of offering for sale any school books or other school supplies, or otherwise attempting to make use of the school buildings under the permission given by the school board, and that he have such other and further relief as may be equitable, together with his costs and disbursements herein.

Injunction was granted during the pendency of this action upon the depositing of a bond for $250 by the plaintiff. The defendants demurred to the complaint upon the grounds: (1) several causes of action have been improperly united, and (2) the complaint does not state facts sufficient to constitute a cause of action.

The court sustained the demurrer on the second ground and ordered that the temporary injunction be dissolved. From this order sustaining the demurrer this appeal is taken.

C. H. Hamilton, for the appellant, cited, among other authorities, *School Dist. v. Arnold,* 21 Wis. 657; *Scofield v. Eighth School Dist.* 27 Conn. 499; *Hurd v. Walters,* 48 Ind. 148; *Spencer v. Joint School Dist.* 15 Kan. 259; *Bender v. Streabich,* 182 Pa. St. 251, 37 Atl. 853; *Hysong v. School Dist.* 164 Pa. St. 650, 30 Atl. 482; *Lewis v. Bateman,* 26 Utah, 434, 73 Pac. 509; sec. 501, Stats.; *State v. Wick,* 130 Iowa, 31, 106 N. W. 268.

For the respondents there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* first assistant city attorney, and oral argument by *Mr. Williams.* They contended, *inter alia,* that a municipal corporation has the right to lease or let municipal property for private purposes when that leasing or letting does not in any way interfere with the public purposes and is in keeping with the public welfare. *Bell v. Platteville,* 71 Wis. 139, 36 N. W. 831; *Stone v. Oconomowoc,* 71 Wis. 155, 36 N. W. 829; *State v. Eau Claire,* 40

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Wis. 533; *Green Bay & M. C. Co. v. Kaukauna,* 70 Wis. 635, 35 N. W. 529, 36 N. W. 828. They also cited, as relating to the use of school houses for purposes that do not interfere with their use for actual school purposes, *Nichols v. School Directors,* 93 Ill. 61; *Townsend v. Hagan,* 35 Iowa, 194; *Davis v. Boget,* 50 Iowa, 11; *Trustees of Harmony Tp. v. Osborne,* 9 Ind. 458; *Lagow v. Hill,* 238 Ill. 428, 87 N. E. 369; *Cost v. Schinault* (Ark.) 166 S. W. 740; *Appeal of Barnes,* 6 R. I. 591; *Chaplin v. Hill,* 24 Vt. 528; *Russell v. Dodds,* 37 Vt. 497; *State v. Kessler,* 136 Mo. App. 236, 117 S. W. 85; *Gottlieb-Knabe & Co. v. Macklin,* 109 Md. 429, 71 Atl. 949, 31 L. R. A. N. S. 580; *Hartwell v. Littleton,* 30 Pick. 229.

SIEBECKER, J. It is contended that the plaintiff has attempted to join an individual cause of action in his favor for damages with an action, which he prosecutes as taxpayer in favor of himself and all others similarly situated, for an injunction to restrain defendants from using the school houses to conduct the alleged private businesses. The allegations of the complaint are that the plaintiff has been damaged in his private business, for which he seeks to be compensated. Can such a cause of action be joined with the equitable relief sought by the plaintiff as representative of a class, namely, the taxpayers of the city of Milwaukee? Sec. 2647, Stats., prescribes what causes of action may be united in the complaint. "But the causes of action so united must all belong to one of these classes and must affect all the parties to the action. . . ." The complaint before us seeks to unite an action in equity, prosecuted by the plaintiff in his representative capacity of citizen and taxpayer of the city of Milwaukee in behalf of himself and all others similarly situated, and an action in his individual capacity to recover damages which he personally claims to have suffered through the acts of the defendants. No one except the plaintiff has any interest in his

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personal action, while the equitable cause of action for an injunction is in favor of a large number of persons whom he represents as a class. As held in *Hawarden v. Youghiogheny & L. C. Co.* 111 Wis. 545, 87 N. W. 472, "Potentially all of the class are parties." Such an action cannot be united in the same complaint with an action which is brought to redress the personal wrongs of the plaintiff. "The two causes of action would not both belong to any one of the classes specified in sec. 2647, Stats. 1898, nor would they both affect all parties to the action, as required by that section." *Luther v. C. J. Luther Co.* 118 Wis. 112, 94 N. W. 69, and cases cited.

The trial court held that the complaint does not allege sufficient facts to constitute a cause of action on the ground that the board of school directors of the city of Milwaukee is authorized to permit defendants such use of the school buildings as is set forth in the complaint. The court based its decision on the provisions of ch. 459, Laws of 1907, and sec. 435*e*, Stats. 1913.

The buildings erected for the public schools are to be devoted to the purposes contemplated by the statutes of maintaining the public schools in providing popular instruction. The legislature has by law made provision to promote the cause of popular education by the organization of local school authorities and conferred on them the power to raise by general taxation the money required to acquire school-house sites and for building school houses, and imposed upon school boards the duties of maintaining the required schools and to devote these school properties to school purposes and manage them as prescribed by law. The allegations of the complaint are in effect that the school directors of the city of Milwaukee granted the defendants permission to use the school buildings of the city for the purpose of conducting private school-book and supply businesses for their personal profit. Do the statutes authorize the use of the public school buildings for conducting such private school businesses for personal profit?

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We have discovered no provision in the statute that confers any authority on school officers to grant the use of school houses for such a private purpose, unless such authority is granted by the acts on which the trial court based its decision. Ch. 459, Laws of 1907, is "An act relating to school boards and common and high schools in cities of the first class." Sec. 18 thereof provides: "The board shall be governed in all things by the school laws of the state, except as they are altered or modified by this act." The trial court considered that sec. 8 of this act, providing that the board may adopt a uniform system of instruction and that the board "shall adopt at its discretion, and modify or repeal, by-laws, rules and regulations for its own government, and for the organization, discipline and management of the public schools under its control, and generally adopt such measures as shall promote the good order and public usefulness of said schools; provided that such by-laws, rules and regulations shall not conflict with the constitution and laws of the state," conferred such authority. The context of this portion of the law clearly indicates that the power of making regulations as therein conferred was intended to include such regulations as were appropriate to promote good order, furnish useful and efficient instruction, and such management of the school properties as would accomplish the purposes of providing the contemplated public education. If the complaint alleged a state of facts which showed that the school board in their official capacity were furnishing books and supplies to pupils as an incident to a successful and efficient conduct of the public schools, we would then have presented to us an entirely different case from the one presented by the alleged facts in this complaint. The facts alleged in the complaint present a case wherein the defendants are charged with conducting "regular stores in the high school buildings under their charge and control wherein they have sold drawing instruments, school books, stationery, and blanks for a profit above the cost of such articles," and that they so

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use the buildings without paying any compensation therefor. It is not charged that the alleged use of these school houses by defendants in any way interferes with the use of the buildings for school purposes. We find nothing in the part of the statute heretofore quoted nor in the provision of sec. 435*e*, Stats. 1913, indicating a legislative intent to confer authority on the school boards of this state to permit the school houses within their control to be used for the conduct of private businesses such as the defendants are alleged to be conducting for their personal profit. We think that school boards have not been granted authority to permit school buildings to be devoted to uses other than to school purposes, aside from those uses expressly enumerated in the statutes. The rule which was enforced under the statutes in the case of *School Dist. v. Arnold,* 21 Wis. 657, has not been modified by subsequent enactments by the legislature nor by the decisions in the cases of *Bell v. Platteville,* 71 Wis. 139, 36 N. W. 831; *Stone v. Oconomowoc,* 71 Wis. 155, 36 N. W. 829; and *State v. Eau Claire,* 40 Wis. 533. These decisions in no way referred to the extent or the nature of the authority conferred on school boards, nor did they in principle involve the questions here presented under the statutes regulating the government and management of the public schools. The *Arnold Case* was adhered to in *State ex rel. Weiss v. District Board,* 76 Wis. 177, 44 N. W. 967.

The trial court erred in sustaining the demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action. The complaint states a good cause of action for relief to restrain the defendants from using the school buildings to conduct their private businesses for profit as alleged in the complaint. The plaintiff as a taxpayer and resident of the city is a proper party to prosecute the action for himself and all others similarly situated.

Since the complaint embraces a cause of action for recovery of plaintiff's personal damages, it follows that the com-

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plaint improperly unites this cause of action with a cause of action in equity for injunctional relief, and the demurrer on that ground should have been sustained and the demurrer on the ground that the complaint failed to state a cause of action should have been overruled; but since the plaintiff is the successful party on this appeal, he is entitled to recover his costs in this court, although the order appealed from, under the circumstances, must be affirmed on grounds other than those on which the trial court acted.

By the Court.—The order appealed from is affirmed.

WINSLOW, C. J. (*dissenting*). I agree that a cause of action for a wrong to a single individual cannot be joined with an action to redress or prevent a wrong done to a class, but in my judgment there is no actionable wrong of either kind stated in the complaint. Taking the alleged taxpayer's action first, it appears by the complaint that the principals of the public schools, with the assistance of some students, are selling to pupils necessary school books and utensils for a profit above the cost, and are using space in the school buildings therefor; that the facts have been investigated by the school directors, who have unanimously declared that it is for the best interests of the schools, pupils, and parents in the way of convenience and economy that the practice be continued, and that the so-called stores are not run for profit.

Inasmuch as the allegation of the complaint is positive that the so-called stores are operated for a profit, it will undoubtedly be necessary to consider the case on that basis notwithstanding the statement of the school board that they are *not* conducted for profit. It may well be, however,—in fact it seems very probable,—that the so-called profit consists of a margin above cost which goes into a fund used to beautify or provide equipment for the school buildings, as was suggested on the argument. The complaint significantly omits to charge that the profit goes to the personal enrichment of defendants.

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However this may be, I think no cause of action is stated. Lawsuits are brought for the redress of substantial wrongs. Especially should this be true of the so-called taxpayer's action. The theory of this action is that the governing body of the municipality or some administrative board is either doing or about to do some act by which the interests of the taxpayers generally are or will be materially prejudiced. Liabilities are about to be created, public moneys spent, or public property wasted in illegal or extralegal enterprises. The foundation of the action is not merely that the public authorities have done or are about to do an unauthorized or extralegal act, but that the act will result in unlawful expenditure of public funds, increased taxation, or waste of public property to the prejudice of the taxpayers. Not every departure from the technically exact line of legal duty on the part of executive or administrative officers is subject to prevention or correction by the taxpayer's action. As said by this court in *Chippewa B. Co. v. Durand,* 122 Wis. 85 (99 N. W. 603), at page 107, "It is the private interest of the taxpayer, after all, that enables him to set judicial machinery in motion in a suit of this sort." It is because the alleged unlawful act injures the taxpayer in his private interest, *i. e.* wastes or expends the money or property of the municipality which belongs to the whole body of taxpayers, that the taxpayer may bring and maintain the action.

The complaint is barren of any allegation either that public money or property is injured or wasted by the operation of the so-called stores, nor does it allege that the interests of the educational system are in any way injuriously affected; there is therefore no wrong to the taxpayers alleged. Such being the case, it follows logically that there is no basis for an action for injury to the business of a private individual. *Stone v. Oconomowoc,* 71 Wis. 155, 36 N. W. 829.

VINJE, J., concurs in the foregoing dissenting opinion.

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GOLDMAN, Appellant, vs. DIEVES and others, Respondents.

November 17—December 8, 1914.

Landlord and tenant: Failure of lessee to obtain possession: When covenants cannot be implied: Remedies: Recovery of bonus: Breach of covenant.

1. Although a lease contains covenants binding the lessee to make certain repairs and to do certain other things with reference to the leased premises, the lessor does not for that reason *expressly* covenant that the lessee be given possession; and under secs. 2204, 2242, Stats., if the lease be for a term exceeding three years no covenant to put the lessee in possession can be implied.
2. When the lessor in a lease for a term exceeding three years is unable to deliver possession to the lessee, such lessee, even though not protected by proper covenants, may withhold the rent or, if paid, recover it back for the period for which possession has been withheld.
3. For acts of the lessor in such a case which tended to prevent the lessee from obtaining possession and were in derogation of the lease, the lessee may recover damages although the lease contained no express covenant by the lessor to put him in possession.
4. A bonus paid prior to the execution of a lease for a term exceeding three years without covenants by the lessors to deliver possession or as to quiet enjoyment, to secure such lease at that time in advance of the termination of an existing lease to another person, cannot be recovered back by the lessee even though he is unable to secure possession at the beginning of his term.
5. A covenant by lessors of premises to be used as a jewelry store that during the term (which was to commence at the termination of another lease) no other jewelry store should be *allowed* in any portion of the building of which the leased premises were a part, was not breached by the fact that a tenant then using the leased premises as a jewelry store wrongfully held over after his term in defiance of the lessors, who proceeded to put him out as soon as the law would permit.

APPEAL from a judgment of the circuit court for Milwaukee county: MARTIN L. LUECK, Judge. *Affirmed.*

For the appellant there was a brief by *Edgar L. Wood,* attorney, and *Nathan Glicksman,* of counsel, and oral argument by *Mr. Wood.*

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For the respondents there was a brief by *Lorenz & Lorenz* and *Lawrence A. Olwell,* attorneys, and *Bernard V. Brady,* of counsel, and oral argument by *Mr. Olwell.*

TIMLIN, J. This action is brought upon a lease attached to and made part of the complaint. This lease was made and dated on March 17, 1906, and demised to the plaintiff a certain store building on Grove street in Milwaukee for the term of five years from May 1, 1906. It is averred that at the time of making said lease the premises were occupied by a tenant of the lessors, who continued in possession thereof until December 3, 1906. On May 1, 1906, the plaintiff demanded possession of the leased premises and the defendants failed and neglected to deliver the possession thereof on said day or at any time thereafter prior to December 3, 1906, when the plaintiff went into possession under said lease. Other averments in the complaint relate to the damages resulting from this alleged breach.

The learned circuit court directed a verdict for defendants on the ground that the lease contained no covenant for possession or quiet enjoyment, and the statutes of this state, secs. 2204 and 2242, provided that no covenant should be implied in any such conveyance.

It appeared that the plaintiff acquired the lease in question for the purpose of using the leased premises as a jewelry store; also that the premises were at the date of execution of said lease and up to December 3, 1906, used for a jewelry store by a competitor of the plaintiff. This man was the sublessee of a tenant of defendants whose term expired April 30, 1906. This sublessee held over, and the defendants at request of plaintiff promptly began an action of unlawful detainer against him which resulted in a judgment of restitution in the justice's court. The sublessee gave a *supersedeas* and appealed to the circuit court, where after trial judgment of restitution was again entered in favor of defendants and against the subles-

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see, who thereupon vacated the premises. This litigation carried the matter along to December 3, 1906. Shortly prior to March 17, 1906, and in order to help him obtain the lease, the plaintiff paid a bonus of $700 to one of the lessors, $200 to an attorney for the lessors, and $25 to a messenger boy, who was a son of one of the lessors. At the time of obtaining the lease he paid one month's rent, and during the time he was kept out of possession he paid the agreed rent monthly in advance. After he got into possession he refused to pay rent to the amount theretofore paid by him before he obtained possession. Some time later the sublessee who kept plaintiff out of possession voluntarily paid to defendants rent for the period from May 1, 1906, to December 3, 1906.

1. It is argued by appellant that the lease contains covenants binding the lessee to make certain repairs and do certain other things with reference to the leased premises and that the lessee could not comply with these covenants unless possession were given to him, hence that the lease contains an express covenant that the lessee be given possession by the lessor in order to enable the lessee to carry out his contract. It it true that such a covenant arises in ordinary contracts, including leases, but it is a covenant by implication. *French v. Bent,* 43 N. H. 448; *Conrad v. Morehead,* 89 N. C. 31. The covenant of quiet enjoyment arising from a demise and the covenant to put the lessee in possession, where these undertakings are not expressed in the lease, are also covenants by implication. *Koeber v. Somers,* 108 Wis. 497, 84 N. W. 991; *Hunter v. Hathaway,* 108 Wis. 620, 84 N. W. 996; and *Koch v. Hustis,* 113 Wis. 599, 603, 87 N. W. 834, are decisive of this case. See, also, *Gardner v. Keteltas,* 3 Hill (N. Y.) 330; *United Merchants' R. & I. Co. v. Roth,* 193 N. Y. 576, 86 N. E. 544. *Poposkey v. Munkwitz,* 68 Wis. 322, 32 N. W. 35, goes upon the existence of a covenant for quiet enjoyment. See 2 Underhill, Landl. & T. pp. 672 *et seq.*

There was no express covenant of the lease broken by the

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failure to deliver possession to the lessee and no other breach is charged in the complaint. We are forbidden to find therein covenants by implication.

2. When the lessor in a lease for a term exceeding three years is unable to deliver possession to the lessee and the latter has not protected himself by proper covenants in the lease, he is not altogether remediless. He may withhold the rent, or if the rent has been paid sue to recover back the rent for the period for which possession has been withheld. This last is not a suit upon implied covenant within the meaning of secs. 2204 and 2242. It is a suit for money paid upon a consideration which has failed. This is, however, unavailable to the plaintiff in the instant case because, with the tacit acquiescence of the defendants, payments of rent for the period for which possession was withheld have been adjusted by failure to pay rent for an equal period during which the lessee had possession and use of the premises.

3. The bonus paid as stated appears by the uncontroverted evidence to have been paid prior to the execution of the lease to secure at that time, in advance of the termination of the existing lease, the lease in question. It clearly appears from the evidence that for such bonus the plaintiff got exactly that for which he paid the bonus, *i. e.* the early execution of a lease for five years without covenants binding the lessors to deliver him possession or maintain him in quiet enjoyment. There is therefore no right shown to recover back this bonus or any part thereof.

4. Appellant contends that there is evidence from which the jury might have found that the defendants, after the execution of the lease in question, did some act or acts tending to prevent the plaintiff obtaining possession under his lease and in derogation of the lease in that respect. If there was a basis for a finding of that kind the law is quite settled that the plaintiff would be entitled to recover damages notwithstanding the absence of express covenant in the lease and not-

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withstanding the statute referred to relating to the absence of implied covenants. But we find no evidence in the record sufficient to support such a finding.

5. A further point is made that there appears in this lease a covenant by the lessors to the effect that during the term of the lease no other jewelry store should be allowed in any portion of the three-story building of which the store in question was a part, and that damages should have been awarded for a breach of this covenant. But no such breach is alleged in the complaint, no such breach is shown by the evidence because the lessors did not *allow* any other jewelry store in the building, and no damages were proven relevant to any such breach. It would not constitute a breach of this covenant that the sublessee held over wrongfully and in defiance of the defendants, who proceeded to put him out as fast as the law would permit. Damages for breach of such covenant would have to be based upon the probable loss to the covenantee arising from the carrying on of a competitive business in the same building. We find no sufficient reason for reversing the judgment of the circuit court.

By the Court.—Judgment affirmed.

VERBECK, Appellant, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Respondent.

November 17—December 8, 1914.

Railroads: Construction and maintenance: Obstructing stream: Flooding lands: Remedies: Condemnation: Recurring nuisance: Limitation of actions: Evidence: Liability of lessee of railroad: Damages.

1. Where, by reason of the faulty construction and maintenance of a railroad, a stream crossed thereby is so dammed up as to flow back upon and injure the adjoining land, the remedy of the land-

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owner is not limited by sec. 1836, Stats., to a proceeding for condemnation; nor, where none of the land so flooded has been taken or used for right-of-way purposes, is sec. 1852, Stats., relating to condemnation, applicable to the situation.

2. The landowner's right of action in such case does not arise from the lawful construction of the railroad where located, but from the failure to restore the stream to its former state or keep its usefulness unimpaired when the railroad was constructed and afterwards; and an action by him for damages by reason of a recurrent nuisance occasioned by such improper construction and maintenance of the railroad is not barred at the expiration of six years from the time of such construction. *Kuhl v. C. & N. W. R. Co.* 101 Wis. 42, distinguished.

3. Evidence in such an action that defendant had operated the railroad since April, 1909; that it maintained station agents and section crews that repaired the track; that complaints were frequently made to it about the flooding; that it made no objection on the ground that it was not the party liable; and that in 1912 it remedied the trouble by putting in a culvert which took care of the water, shows a *prima facie* liability on the part of the defendant, though a mere lessee, for the damages accruing since the date first named, when it took possession of the road.

4. Evidence in such action that eight or nine acres of plaintiff's land were rendered untillable by reason of the flooding and that the rental value per acre in ten-acre lots was $10 to $12, was sufficient to show substantial damage, and a nonsuit was improper.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Action to recover damages for flowage of plaintiff's land. The material allegations of the complaint are these: Plaintiff is and since July 1, 1898, has been the owner of a certain eighty-acre tract of land adjoining defendant's right of way on the south. The land slopes to the north and a natural stream of water flows through it in a northeasterly direction. Prior to 1875 the defendant constructed a railroad track on an embankment along the northern side of his premises and crossing the stream. The embankment and track were improperly and negligently constructed in that no suitable or proper provisions were made therein for the passage of the stream of water in its natural course, by reason of which it became

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dammed up and was caused to flow back upon and overflow about fifteen acres of plaintiff's land adjacent to the right of way. Such flooding has continued until a short time prior to the commencement of this action, and has existed during all seasons of the year, rendering the land marshy, muddy, and unfit for cultivation. In times of high water a much larger portion of plaintiff's land is flowed. Damages in the sum of $1,000 are asked.

The answer was a general denial, and a plea of the six years' statute of limitations. At the close of plaintiff's testimony the court granted a motion for a nonsuit. From a judgment entered accordingly the plaintiff appealed.

For the appellant there was a brief by *Somers & Velte,* and oral argument by *L. J. Somers.*

For the respondent there was a brief by *W. A. Hayes* and *Bouck & Hilton,* and oral argument by *Mr. Hayes.*

VINJE, J. The testimony relating to the flooding was very brief and was given by the plaintiff himself. He stated that he had owned the farm since 1898. In 1909 the railroad embankment contained a culvert at the northeast corner and a bridge at the northwest corner of the farm. Prior to 1909 the culvert and bridge did not take care of the flowage of the watercourse. There was a severe flood in May, 1909, and his man complained and plaintiff called up the agent of the Soo road at Neenah and asked him to send up section men. Between 1909 and the summer of 1912 he called up the station agent at least ten or twelve times. He also spoke to the section foreman during 1910 or 1911 while floods were on. The floods came irregularly. At times the brook flows in a regular manner and fish can be found therein. The course of the stream is the natural course for a whole section of the county, and when there is a flood the brook fills up and is then about five rods wide. During the dry season the lakes get low. These floods are periodical, sometimes two in a year,

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sometimes three in a year, and in the year 1911–1912 the land was flooded nine times. The land is not covered with water all the time; a good part of the time the land is clear. Since May, 1909, from twelve to fifteen acres of the plaintiff's land has been under water. About eight or nine acres of this land was untillable on account of the water, but he could rent none of the twenty-acre tract. In ten-acre quantities land would rent for $10 or $12 an acre. In 1912 an additional culvert was put in by the defendant road and since then there has been no damage to plaintiff's land on account of flowage.

Defendant claims that the provisions of secs. 1836 and 1852, Stats. 1913, apply, and that plaintiff's only remedy was one for condemnation. The latter part of sec. 1836, reading "and all provisions of these statutes for acquiring land by right of eminent domain and making compensation therefor shall apply in assessing damages for such closing and for injury to lands thereon," is relied upon as limiting the remedy to a condemnation proceeding. It is quite evident upon reading the whole section that the part quoted refers to a situation where sloughs or bayous of a navigable river are closed by the construction of a railroad and so does not apply to the facts in this case. Neither does sec. 1852 cover the situation. That deals only with lands upon which the track, roadbed, or any part thereof is constructed, and provides for condemnation thereof. The land flooded is outside the right of way and none of it has been taken for right-of-way purposes. At best it can only be claimed that by reason of faulty construction and maintenance of the track and roadbed plaintiff's land has been flooded. It has not been nor is it needed for the maintenance of the track, as is shown by a description of the situation of the track with reference to the land and stream as well as from the fact that since another culvert was put in there has been no flooding.

The case of *Kuhl v. C. & N. W. R. Co.* 101 Wis. 42, 77 N. W. 155, relied upon by the defendant, presented quite a

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different situation. There damages were sought to be recovered by an owner of property abutting upon a street for the construction of a railroad along the street, and it was held that sub. 3, sec. 4222, limiting the commencement of actions to six years, applied, though the railroad constructed was located on the further side of the street from plaintiff's land. The right of action was given by ch. 255, Laws of 1889, and the damages grew out of the lawful construction of the railroad, and the right of action was held to accrue when the road was constructed. Here the damages did not arise out of the lawful construction of the railroad, but out of defendant's failure to comply with the statutory requirement to restore a stream to its former state or to keep its usefulness unimpaired when it constructed its railroad and afterwards. The action here is for damages by reason of a recurrent nuisance occasioned by an improper construction and maintenance of a railroad track, and not for damages growing out of its construction where located.

No title to the flooded lands is claimed by adverse user, so that question need not be considered. The proof showed that the defendant began to operate the railroad in April, 1909; that it maintained station agents, and section crews that repaired the track; that complaints were frequently made to it about the flooding; that it made no objection on the ground that it was not the party liable; and that in 1912 it remedied the trouble by putting in a culvert that took care of the water. Such proof showed *prima facie* liability on the part of the defendant though a mere lessee. *Slight v. Gutzlaff*, 35 Wis. 675; *Arpin v. Bowman*, 83 Wis. 54, 53 N. W. 151. The proof showed intermittent or recurring nuisances, each one of which constituted a new cause of action. *Ramsdale v. Foote*, 55 Wis. 557, 13 N. W. 557; *Kimberly-Clark Co. v. Patten P. Co.* 153 Wis. 69, 84 (140 N. W. 1066) and cases cited. The action was begun August 18, 1913, and damages accruing within six years of that date would be recoverable against the

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defendant but for the fact that it was not in possession of the road prior to April, 1909, so damages accruing only since the latter date can be recovered.

The proof on the subject of damages was quite meager and indefinite. But it did show that eight or nine acres were rendered untillable by reason of the flooding and that the rental value per acre in ten-acre lots was from $10 to $12 per acre. This proof showed some substantial damage and the nonsuit was erroneously granted.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

LUTHERAN TRIFOLDIGHED CONGREGATION OF NEENAH, Appellant, vs. ST. PAUL'S ENGLISH EVANGELICAL LUTHERAN CONGREGATION OF NEENAH, Respondent.

November 17—December 8, 1914.

Remedies: Equity: Courts: Corporations: Meetings: Notice: Waiver: Religious societies: Factional division: Rights of majority: Sale of property.

1. For violation of a remediable right the person injured has an absolute constitutional right to a remedy conformably to the laws; and a court may not deprive him of such right by denying an equitable remedy where that is the only one available or where such denial is practically a denial of justice.
2. A court may not supersede the legal and equitable rights of parties by judicial notions of what is best for them from a moral standpoint.
3. Statutory and other requirements for notice of meetings of the members of a corporation are for the benefit of such members and may be waived by their presence and acquiescence.
4. The constitution of a religious corporation provided, in effect, that in case of a division of the membership the majority should be considered the proper congregation and should keep the property. It also provided that meetings of the congregation should be called by the minister. After a division had occurred the

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minister, who was of the minority faction, refused to call a meeting. *Held*, that those composing the majority faction were the only members of the congregation entitled to a voice in administering its affairs; that under the circumstances the requirement in the constitution as to notice was inoperative; that no one of the minority was entitled to notice; and that the majority had the right, upon reasonable notice, to meet and act or, if all were present, to act without previous notice.

5. A sale of the church property, therefore, which was in good faith authorized and afterwards ratified at meetings attended only by those of the majority faction, but of which meetings all of both factions had actual notice, was valid and binding upon the congregation.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Action to set aside a deed purporting to have been executed by the trustees of the plaintiff corporation, conveying its church property to the defendant. These are the facts, as found, which were held to require the judgment complained of: In 1912, plaintiff was composed of thirty-one members. It was and still is, indebted in the sum of about $600 with no means of paying the same other than by a sale of the property in question. A majority of such members favored such sale. There was a bitter factional division in the congregation over the pastor and other matters. November 4, 1912, at a meeting of members of the plaintiff at which only those of the majority faction attended, it was voted to sell the property for $600 and the trustees were authorized to execute the necessary deed. Regular notice of such meeting was not given by the clergyman as required by the organic law of the corporation, because he had refused to read a notice of a meeting desired by the majority faction; he claimed it was not regular; but all members, in fact, had actual notice of the meeting in time to have attended. January 4, 1913, a deed of the property was executed pursuant to the authority aforesaid. The deed was thereafter duly delivered to the defendant, the purchaser, and it took possession of, and has since retained the

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property. August 16, 1913, a meeting of the members of plaintiff was held at which a majority attended, and by resolution, ratified the sale and condemned the commencement and prosecution of this action. Notice of the meeting was not given as provided by the constitution of plaintiff, but all members of the congregation had actual notice thereof, in advance. Such constitution contains this:

"In the event of a division of this congregation, which God in His mercy forbid, the majority shall be considered as the proper congregation, and shall keep the property of the congregation. However, this shall apply only in so far as (provided that) the majority remain true to the Lutheran faith. In the event of the opposite, the minority in so far as (provided that) it remains true to the arrangements of this congregation, shall be considered the proper congregation and shall keep the property."

Both factions so remained true. Defendant acted in good faith in making the purchase, and subsequently to taking possession of the property, expended $130 for necessary repairs thereon. There was no conspiracy to do the act complained of. There was such a factional difference among the corporate membership as to render its useful existence impossible. The sale was advantageous to plaintiff and was the only method by which it could pay its debts. The price obtained was not inadequate. The opposition to the sale is represented by not to exceed ten per cent. of plaintiff. It is for the best interests of all parties that the sale and conveyance of the property should be confirmed. The evidence does not make a case entitling plaintiff to equitable relief.

Judgment was rendered confirming the deed to respondent and dismissing the action with costs.

For the appellant there was a brief by *David C. Pinkerton*, attorney, and *Charles and Henry Barber*, of counsel, and oral argument by *Mr. Pinkerton*.

For the respondent there were briefs signed by *Mayhew Mott*, and oral argument by *Mr. Mott*. He cited, among

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other cases, *Duessel v. Proch,* 78 Conn. 343, 62 Atl. 152, 3 L. R. A. N. S. 854; *Fuchs v. Meisel,* 102 Mich. 357, 60 N. W. 773, 32 L. R. A. 92; *Dressen v. Brameier,* 56 Iowa, 756, 9 N. W. 193; *Nance v. Busby,* 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801; *First P. Church v. Myers,* 5 Okla. 809, 50 Pac. 70, 38 L. R. A. 687.

MARSHALL, J. The function of judicial remedies is to redress and prevent wrongs of sufficient dignity according to the written or unwritten law to be worthy of such interference. There are many outside of that field left to be redressed by the condemnation of the wrongdoer's conscience or social condemnation or penalized in some other way within his environment. The former are denominated remediable rights,—that is such as if violated the right to a remedy is created. The right violated is one thing. The right to a remedy for the wrong is another. The latter is just as inviolable as the former unless use of the necessary instrumentality, the court, shall have been, in some way, forfeited, absolutely, or it falls within the field of judicial discretion to withhold such use.

A remediable right may be strictly legal and its violation a subject for legal relief, or for legal or equitable relief according to circumstances, or it may be strictly equitable and so a subject for equitable relief only. In case of the two methods of relief being adaptable to the case, the legal relief is to be sought for, other than in exceptional cases where it will not furnish as adequate relief as justice in the judgment of the court, guided by well settled principles, requires as equitable relief will afford. In such a situation the court has some discretion as to whether the equitable instrumentality shall be used or not, but the right to redress of some sort for the violated right is just as absolute as the primary right itself. It is a natural possession and within the fundamental declaration: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his

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person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." Sec. 9, art. I, Const. Thus it is not within the competency of a trial court upon any notion of equity not involving forfeiture of the right, "conformably to the laws" to take it away as by denying the use of the equitable remedy where that is the only one available, or denying it where the circumstances are such as to practicably amount to a denial of justice. One so circumstanced, in invoking the use of a judicial remedy is not appealing to gracious interference, but demanding a right,—that the court reach out its arm and compel restitution of what belongs to him and from his adversary who has no right thereto.

Applying the foregoing to the facts of this case it would seem that, if the members of the appellant who, assuming to exercise the power of the corporation, sold, conveyed, and transferred possession of its place of worship to the respondent corporation, had no right to do so, a remediable wrong was committed, giving rise to the right to a judicial remedy to redress it. It is a mistake to suppose that in such a case anything more than the mere existence of the violated legal right is required to set a court of equity in motion. That court, like every other branch of the government, must face the constitutional guaranty of a certain remedy in the laws to redress every wrong "completely and without denial." It is a creature of the constitution and its most important function is to vitalize its guaranties. It is not within the competency of courts to exercise a sort of paternalistic conservation of the interests of parties according to their best interests, in its judgment, thus superseding the legal and equitable rights by the judicial notions of what is best for them from a moral standpoint. Error seems to have prevailed in both these respects as we read some phases of the opinion of the learned trial court. That was emphasized by the judgment.

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The decree did not go upon the ground that, under all the circumstances, only legal relief should be afforded, and then proceed to afford relief of that nature and take additional evidence if necessary. Nor did it rest with a mere dismissal for want of equity, leaving the plaintiff free to seek equitable relief as would seem to have been the view of the court when its opinion was written, if it were not for the draft of findings accompanying it. In the opinion it is said: "I conclude that the only judgment which the court can render is to dismiss the complaint. It is so ordered." But that was followed by suggestions for findings and conclusions for relief, affirming the acts challenged as illegal, affirming the conveyance to respondent corporation and its title to the church property, and judgment was so rendered.

The learned trial court answered the claim of appellant that the deed of the church property was void on its face for want of a seal as the statute requires, by saying that, if so, it is not a cloud on title and a court of equity will not interfere in such a case, citing *S. L. Sheldon Co. v. Mayers,* 81 Wis. 627, 51 N. W. 1082, and *Meloy v. Dougherty,* 16 Wis. 269, overlooking the fact that this was not an action to remove a cloud on title, but one to have a deed and contract declared void and to obtain restitution of the church property. Though appellant was out of possession, it was proper to sue for equitable relief, since the facts were provable only by evidence *aliunde* the record, and, further, if the paper title of respondent corporation be not technically a cloud on title, it was proper to declare for equitable relief. *Gibson v. Gibson,* 102 Wis. 501, 508, 78 N. W. 917; *Post v. Campbell,* 110 Wis. 378, 383, 85 N. W. 1032; *Suring v. Rollman,* 145 Wis. 490, 498, 130 N. W. 485. It was further overlooked that the mere relief asked for had very little to do with the case anyway. The technicalities which at one time stood in the way of relief of the proper kind on the facts because of the nature of that asked for, overlooking that there is but one court and one form of action, with no obligation

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to ask for any relief except that which the party deems himself entitled to, and no penalty for not asking for the particular relief appropriate to the case, precluding that being afforded, have ceased to be efficient interferences. What were the rights of the appellant on the facts of this case? That was the sole question the court had to deal with. Those rights were not within the competency of the court to take away or do anything with except to vindicate them.

As we read the opinion and the findings and understand concessions made upon the argument, the persons who executed the deed sought to be set aside were not authorized to do so in the manner required by the organic law of the corporation, unless the minority members were excluded from any voice in the matter under the provision of the constitution hereafter treated. The constitution provides that meetings of the corporation shall be called by the minister, which was not done in the instance in question. If the meeting at which the vote was taken to sell the church property was not legally called, the action then taken to sell and convey the church property was not legal and so not binding on the corporation. Such meeting was not legal, as seems to have been practically conceded by the court below and counsel, unless the constitutional requirement as to the manner of convening members of the corporation to deliberate and act upon its affairs was superseded under the circumstances by the following provision:

"In the event of a division of this congregation, which God in His mercy forbid, the majority shall be considered as the proper congregation, and shall keep the property of the congregation. However, this shall apply only in so far as (provided that) the majority remain true to the Lutheran faith. In the event of the opposite, the minority in so far as (provided that) it remains true to the arrangements of this congregation, shall be considered the proper congregation and shall keep the property."

That seems to cover any division of the membership of the

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church as to a majority and minority faction, preserving to the former, in all cases, ownership, control, and disposition of the church property,—practically the whole power of the corporation in respect to it, with the single condition of the members of such majority remaining true to the Lutheran faith. That, by necessary implication, must operate as a proviso to the requirement that meetings of members of the corporation shall be called in a particular way, where there is a majority faction true to the faith and, so, in actual possession of all the corporate power, and a minority faction composed in part of the minister and all those which under ordinary circumstances are required to convene the membership for business, which under the particular circumstances are without any power whatever. Otherwise there would be the anomalous situation of a corporation with membership possessing all the corporate power without any way of getting together to do business.

In that view it was immaterial how the majority members were called together so long as they were all present or subsequently ratified what was done by those who were present.

We do not overlook the contention of counsel that the members of appellant who participated in the proceedings to sell the church property did not constitute a majority faction. The findings of the trial court are to the contrary, and do not seem to be against the clear preponderance of the evidence.

It follows that the judgment must be affirmed, though many of the reasons for it assigned by the trial court are unsound as we have seen. Under the facts, to all intents and purposes, the members of the majority faction at the time of the occurrence in question were all members of the corporation. The division was of long standing. It had become fixed and there was such bitterness between the two interests that exclusion of the minority was the only means of peace. The constitution provided a remedy for the unfortunate situation. The particular provision evidently was incorporated to meet

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just such a situation,—one which experience had shown was quite likely to occur, sooner or later. When it did occur there was really left as members of the corporation only those who composed the majority prior to the division and as there was no minister, from the necessities of the case, and according to the law governing corporations generally in the absence of some efficient prohibition, they had a right to convene upon reasonable notice and act, or all being present to act without previous notice. No one who was present could impeach what was done, because the requirement for notice is for the benefit of the members and presence waived it. Statutory and other requirements for notice of meetings of stockholders may be waived by their presence and acquiescence. 2 Cook, Corp. (7th ed.) § 599; 1 Thompson, Corp. (2d ed.) §§ 824, 825.

No one who was not of the majority was entitled to notice, because, by force of the constitution of the corporation, he had ceased to be a member entitled to a voice in administering the affairs.

By the Court.—Judgment affirmed.

WESTBERG, Respondent, vs. KIMBERLY-CLARK COMPANY, Appellant.

November 18—December 8, 1914.

Master and servant: Injury: Fall of elevator: Contributory negligence: Questions for jury.

The platform of a freight elevator in a paper mill stood open and at the level of an upper floor, with a bale of paper stock weighing 700 or 800 pounds upon it. The cables of the elevator were partially unwound and hung loose on or below its top. An employee wishing to go to a lower floor stepped upon the platform, and the elevator at once fell to the basement and he was injured. *Held*, that the question of his contributory negligence was for the jury.

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APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Hooper & Hooper,* and oral argument by *Moses Hooper.*

For the respondent there was a brief by *Bouck & Hilton, Edward J. Dempsey,* and *John F. Kluwin,* and oral argument by *Mr. Kluwin* and *Mr. Dempsey.*

TIMLIN, J. The respondent, an employee of appellant, had a verdict for $7,500 damages for personal injuries caused by appellant's negligence. The only question raised upon this appeal by the learned counsel for appellant is whether there was such affirmative proof of contributory negligence on the part of the respondent that the verdict of the jury acquitting respondent of such negligence has no support.

The appellant owns two paper mills side by side, and recessed in one but serving both is a freight elevator which is used for conveying raw material called paper stock from one floor up to other floors and is also used by the employees in going from floor to floor. The floors served by this elevator are upon different levels in each building, but we find no figures which would enable us to state the extent of these differences. According to evidence which the jury was warranted in believing, the respondent and another employee in the course of their employment, desiring to descend to a lower floor, found the elevator platform open and level with the floor upon which they stood, and standing still with a bale of seven or eight hundred pounds of paper thereon. They stepped upon the elevator and it at once fell to the basement, injuring the plaintiff. The elevator was equipped with no clutch or governor or other safety device. It was lifted and lowered by twin cables fastened to the arched top of the elevator frame and passing around revolving drums, which the evidence does not clearly describe either as to location or operation. It is inferred with probable accuracy that the ele-

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vator was merely held in place by pinching or binding on the sides and that the cables were unwound from the drum and hung down more or less into the elevator or at least below the arch or upper portion of the elevator. An experiment was made by defendant some time later with the elevator about a foot and a half below this floor, a bale of paper thereon, and with unwound cables. Photographs were taken of the elevator at this time which indicate that the cables would hang down below the arch or top of the elevator to about the height of a man's head from the elevator floor and nearly to the top of the bale of paper, but on the other or distant side of the elevator arch. It is argued that this photograph established that the loose cables were visible to the plaintiff when he entered the elevator and that he must have seen them and from this have known the probable consequences of stepping onto the elevator while it was in this condition, and hence he was guilty of contributory negligence.

The analogy of contributory negligence at a highway crossing of a railroad is invoked. It is said that one who crosses the railroad track in advance of an approaching train seeing the train, is guilty of contributory negligence in attempting to cross, and that if he cross in advance of such approaching train without seeing the train he is likewise guilty of negligence in not seeing the train, or that he must have seen had he looked and his statement that he did not see it will not be accepted. But the analogy is imperfect. The railroad crossing is always dangerous to pedestrians and it furnishes a warning itself. An elevator standing at a floor with seven or eight hundred pounds weight thereon and cables hanging down is not always dangerous. That depends upon its construction and its equipment. An approaching train is much larger, much noisier, and much more conspicuous than a wire cable or two wire cables. The inference of danger from an oncoming train is more certain and the consequences of collision more apparent. One might well enter an elevator

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without glancing at the cables or glancing over his head and not see the cable, as plaintiff testifies he did. The photographs, while they make it probable, do not make it certain that the cables hung just in that way at the time of the injury. Indeed, there is the statement of a witness that the cables hung loose on top of the elevator. Whether the plaintiff's conduct in entering the elevator as he did was that of an ordinarily prudent person was, we think, a question of fact for the jury. Even if we were to assume that the cables were hanging loose as they appear in the photograph at the time of the injury, that would not be a certain indication of danger unless one observing the cables was familiar with the mechanism of the elevator. We consider that the question of plaintiff's contributory negligence was for the jury.

By the Court.—Judgment affirmed.

KERWIN, J., took no part.

ESTATE OF BEAN: COWAN, Appellant, vs. BEAN and another, Respondents.

November 18—December 8, 1914.

Wills: Mental capacity: Evidence: Preponderance against findings below: Weight: Physicians: Hypothetical questions: Appointment of guardian: Effect: Statute construed: "Gifts:" Supreme court: Allowance for attorneys' fees.

1. The clear preponderance of the evidence in this case is *held* to show, contrary to the findings of the county and circuit courts, that a testatrix had testamentary capacity at the time of making her will.
2. The opinions of physicians as to the mental competency of a testatrix are of little probative force where they are based upon the facts assumed in a hypothetical question from which all the matters and evidence relied upon by the proponent were excluded.
3. Where the appointment of a guardian for an aged person was

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sought because of physical and not mental disabilities, and the evidence taken in that proceeding shows that no guardian should have been appointed, the appointment is of no evidentiary force or weight upon the question of the testamentary capacity of such person.

4. Sec. 3979, Stats.,—providing that the petition and order for notice in guardianship proceedings may be filed and recorded, and if a guardian is appointed all contracts except for necessaries and all *gifts*, sales, and transfers of property by the incompetent after such filing shall be void,—does not apply to wills or legacies provided for in wills.

5. Under sec. 4041*b*, Stats., the supreme court may, in a contest as to the probate of a will, fix the amount to be allowed as attorneys' fees for work done in that court.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

This action involves a will contest. The testatrix, Ann Bean, made her will on July 13, 1910, and died in July, 1912. On July 8, 1910, a petition was filed in the county court of Winnebago county for the appointment of a guardian for Ann Bean, which alleged among other things that she was mentally incompetent because of total blindness which had existed for more than twenty-five years, because of her advanced age and of a recent accident which she had suffered, and because of physical disability and a weak mind. A hearing was had on such petition and on August 13, 1910, one Edwards was appointed guardian for the alleged incompetent. The deceased by her will gave all of her property to two nephews and one niece. Her surviving heirs at law were a brother, who was blind, two sisters, twenty-nine nieces and nephews, two grandnephews, and one grandniece. The appraised value of her property was $4,283.70. The deceased had lived for many years in a house occupied by her sister and her sister's son and his wife and their children. Objection was made to the allowance of the will to probate on the ground that the testatrix was mentally incompetent to make a will and on the further ground that the will was the result of undue influence. The contest was heard in the

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county court and that court held that there was no evidence of undue influence, but further held that the testatrix did not have testamentary capacity when the will was made. From the order and judgment of the county court refusing to admit the will to probate an appeal was taken to the circuit court. In that court the case was tried in part on the original record and on some additional testimony which was offered. The circuit court found as a fact that when the will was executed and for some time prior thereto the testatrix had and was suffering from senile dementia and that by reason of such disease she was wholly incapacitated to make a will, and that the paper purporting to be her will was not a sane and intelligent expression of her testamentary purposes for the disposition of her property, and that she was lacking in mental capacity to make a valid will and wholly incompetent to do so. The court further found that no undue influence was exercised over the testatrix. The order and judgment of the county court were affirmed, and from the judgment of affirmance an appeal was taken to this court.

For the appellant there was a brief by *Carter & Pedrick,* and oral argument by *S. M. Pedrick* and *W. N. Powers.*

For the respondents there was a brief by *John W. Hume* and *Silas Bullard,* and oral argument by *Mr. Hume.*

Barnes, J. This case involves a question of fact pure and simple. It has been carefully tried by a capable county judge of recognized ability who has long been an honored member of the bar of this court. It has been tried a second time by an able and experienced circuit judge, who has reached the same conclusion as did the county judge. We approach the matter of overturning the findings of fact made by these two courts, with some misgivings. The findings may not be disturbed unless they are against the clear preponderance of the evidence, and there is certainly some evidence to support them. The case is here, and it is the duty of this court to reach what it deems to be a correct conclusion,

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always bearing in mind the effect that should and must be given to findings of fact made by judges who have heard the testimony and had the opportunity to see the witnesses who gave it. The will was short and easily understood and made a rational disposition of the property of the testatrix.

A brief synopsis of the evidence offered in behalf of the proponent will first be given. It is of two kinds: that dealing with Ann Bean's condition on the day the will was made and that relating to her prior condition. She had been blind for about twenty-five years before she made her will. She occupied a couple of rooms in the house of her sister Mrs. Pugh, where she did her own cooking and cared for herself as well as she could. Five or six weeks before the will was made, while she was lighting a fire, her clothing caught fire and she was seriously burned and suffered a great deal of pain from the injury. She was attended by Dr. Schallern of Ripon, who had been her physician for some time. On July 12th she asked Charles Jones, a neighbor, to write a letter for her to Dr. Schallern requesting him to bring over *Charles Cowan,* a banker at Ripon, to draw her will. The letter was written, and the following day Dr. Schallern came to Ann Bean's home. The doctor was accompanied by his son, *Mr. Cowan,* and Dr. Hall, another Berlin physician. Dr. Hall seems to have been taken along for the purpose of ascertaining the mental condition of Miss Bean. The two doctors in substance testified that she told them she wanted to make her will and of the disposition she wanted to make of her property. They say they talked with her about half an hour to ascertain her mental condition and that they arrived at the conclusion that it was good and that she was perfectly competent to make her will. *Mr. Cowan,* and Charles Jones who was called in to witness the will, corroborated the testimony of the physicians and expressed the opinion that she was entirely competent to dispose of her property. Dr. Schallern's son, who was present and was one of the wit-

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nesses to the will, testified that in his opinion her mental condition was perfect at the time the will was made. As far as the record discloses, all five of these witnesses were entirely disinterested. Rose Fuller, a sister of the wife of Miss Bean's nephew, David Pugh, had been living in the same house with Miss Bean since the 1st of July and talked with her from time to time, including the day the will was made. The witness said Miss Bean's mind seemed to be perfectly natural and she thought it was very sound. She testified that Miss Bean told her after the will was made that she was glad that "it was done and it was done as it should be." Hugh Williams, a near neighbor, who had known Miss Bean for thirty-five years, testified that he had seen and talked with her quite frequently up to the time of the execution of the will and that in his opinion her mental condition was all right on the occasion of his visits. He talked with her on the evening of the day the will was made and she told him about it and that she was glad that it was over with. In the opinion of the witness she was mentally competent to transact business on the day the will was made.

The foregoing is all of the testimony specifically directed to the mental competency of Miss Bean on July 13, 1910.

In addition to the evidence of the witnesses Jones, Fuller, and Williams, who testified to the mental condition of Miss Bean before and after the execution of the will, a number of other neighbors, acquaintances, and relatives expressed the opinion that she was of sound mind, basing their judgment on conversations occurring near the time the will was made.

Mrs. Plantz knew Miss Bean thirty-five or forty years. They lived about a half a mile apart. She said she used to visit Miss Bean and could talk with her as well as with any person. Remembered when she was burned; saw her after that several times and talked with her; she suffered a good deal from the burns. Her memory was all right as far as the witness could see. If she asked her any questions she

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answered them all right. Saw her frequently until she died. She was a little odd because she was blind, and acted kind of funny, but otherwise she was all right so far as the witness could see. Jennie Miller, the daughter of Mrs. Plantz, testified that she visited Miss Bean two or three times a year and as far as she could see her mind was perfect. Saw her twice after she was burned, once three or four days after and then three or four weeks later. The first time her physical condition was not all right, but she thought her mental condition was. The second time, she talked with her and thought her mental condition was all right; saw no change from what she had been during the years before. William Park, a neighbor, testified that he saw and talked with Miss Bean frequently before and after she was burned and that she appeared to be all right at all times. This witness testified that she told him that Attorney Weisbrod was sent out there by her sister Mrs. Davis to make a will, and that she didn't like him and would not do anything for him. Mrs. Thrall lived about a mile and a half from Miss Bean and knew her for forty-five years and visited her quite frequently. She called on Miss Bean about a week after she was burned and had a talk with her; talked about the weather and such things as that. Miss Bean was glad to see her and wanted her to come again. She came back in a month and Miss Bean asked her many questions about business and the neighbors. She was very much better. She spoke about folks being good to her while she was sick. Her talk was not incoherent or disconnected. Saw her afterwards in September. She recognized witness' voice immediately, talked about the farm, asked after witness' husband and wanted to know how he was, and said she would be glad to have him come and see her. Witness thought that at all times her mind was sound. William Pugh, a nephew of Miss Bean and a brother of the beneficiaries in her will, said he saw her about the 1st of July, 1910, and that she then told him how she was burned; next saw her the first part of August. "She

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asked if there were any sales of shoes going on in town, and I said 'Yes.'" "She asked me if I would get her a pair if she gave me the money, and I said I would. She also asked me to get some home-made wine if I could get it. She gave me two dollars to buy shoes and a dollar for the wine. I could not get the size shoes she wanted, but sent the wine to her." Later in August he called on her, and she told him that he owed her $2. He did not have the change at this time and did not see her again until December, when he offered the $2 to her and she told him to keep it, that she would make him a present of it. She spoke to witness once about her will and said that Weisbrod had been out there, but she would not have him make her will, but she said she had made one. This witness resided in Oshkosh. Richard Pugh, who was intimately acquainted with Miss Bean, said that he never saw anything wrong with her before she was burned and that she transacted her own business and used good judgment. Never had any idea but what she was all right up to the time the will was made.

Aside from the medical testimony offered, the contestants swore eleven witnesses who knew Miss Bean in her lifetime and who expressed an opinion as to her mental competency and detailed the reasons for their belief. Most of them were interested in having the will set aside.

L. Williams's testimony tended to show that Miss Bean was sane both before and after she was burned. He simply said that her memory was not so good in 1910 and 1911 as it had been. Mrs. Ethel Bean's testimony hardly tends to show insanity before the will was made. She testifies to facts occurring thereafter, however, which would indicate that Miss Bean was not in her right mind. Ellen Bean said that she had heard Ann say that she would remember *Alvin Bean* in her will. Saw her shortly after she was burned; she didn't know anything; she couldn't understand anything I said to her; she didn't say much of anything; she was very low that

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day; her fingers and hand were burned almost to the bone and she suffered greatly and was more or less delirious; the year before she was at my house over a week and had a pretty bright mind at that time.

August Semrau talked with Miss Bean at some indefinite time after she was burned; thought she was a little out of the way because she repeated statements she had made and asked the same questions more than once. Thought from the way she talked that she wasn't competent to do business. Mrs. Ed Williams thought she saw Miss Bean in 1907, 1908, 1909, and 1910, but didn't remember much about it. Saw her on July 30, 1910. Ann did not recognize her. "I told her who I was, and after I told her over and over she was able to recognize me." She asked two or three times how witness came. "When I saw her in July, 1910, I didn't think she was sound. I shouldn't say she was able to make a will at that time." Saw her again in April, 1911. "I had to tell her more than once who I was before she recognized me. We didn't talk very much because I didn't think she was able to talk a great deal."

Mrs. R. C. Lloyd saw Miss Bean during the spring of 1907, 1908, and 1909 occasionally, now and then, not very often. "She was getting kind of forgetful. Her memory didn't seem to be the same as it used to be. I couldn't tell when I first noticed a change. Well, her mind wasn't the same before she was burned; that is, she used to talk the same thing over and promised this and promised that and never fulfilled her promises." "She was burned on June 4, 1910. I was there sitting up with her Wednesday night." "Well, she talked a good deal and I never paid any attention to what she said. She said 'The roof is coming down on me.' " "About a week after this I was there and she didn't recognize me and I couldn't make her understand who I was. I should say from what I saw of her on those visits that she was not sound . . . or would have been able to carry in her mind the extent of her property and the persons who were the natural objects of her bounty."

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Hannah Bean saw Ann Bean frequently in 1906, 1907, 1908, and 1909. "She was sometimes very good and after that very changeable." Witness did not notice any change in her mental condition the first time she saw her. Saw her changing in 1911. "Before she was burned I went up to her and shook hands with her and she didn't know me." "She talked to me. I forgot what she said. She had no right talk." "Her mind kept to me just the same, changeable all the time." "I was there in 1911." "That night I was with her by the bed and she said, 'He's a dog to me, take that dog out, he will bite me.' I couldn't see any dog." "Every time I went there she told me to lock the door, she didn't want anybody in." "Her mind was different from other persons'. I couldn't call it sound. I guess for my part I would call it unsound." "She told me one day that there was a board where she sat on the wheel chair, I should find the board, and she made me hunt around all day for the board and I couldn't find any board." Witness had conversation with Miss Bean prior to July 13, 1910, and she said she would leave *Alvin Bean* $1,700. If we correctly understand the record, *Alvin Bean* was the son of the witness.

It will be noted that this testimony relates very largely to the condition of Miss Bean at a time subsequent to the making of the will.

William Bean testified that he knew Ann all his life. She died in June, 1912, when witness was thirty-seven years old. Visited her two or three times a year. She used to be quite jolly. "Afterwards I noted a change, about five years ago. I would get one word maybe, that would be all, then she was gone." "She seemed worried. I noticed the change during the five years." "Seemed to be coming on gradually." "I didn't see her after she was burned." Saw her three times during the month before she was buried. On one occasion she did not know witness; on another occasion she did seem to know him. The last time she didn't realize anything.

Ben Edwards: Was appointed guardian for Ann. After

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that he went to see her about the middle of August, 1910. Saw her a couple of months later. On the first day witness saw her he thought about her physical condition more than her mental state. "The first time that I discovered to my satisfaction that her mind was unsound was after her sister's death," which occurred in December, 1910. "I saw her several times before that." Witness saw Ann, but not very much, while he was taking the inventory. She did not really discuss her property with him. On September 16th the appraisers were there. At this time witness talked with Ann Bean about her property and discussed each of the obligations with her. "She was exceedingly bright that day. She seemed to have her mind good that day. She didn't know how much interest had been paid, but she was satisfied. We consulted with her and she said 'Yes,' that is all that she would say." "*Q.* But she had at that time an appreciation of what her property was and how much it was? *A.* Well, she seemed to be real rational that day."

The foregoing evidence was given in the county court. In the circuit court the witness testified that a few days after he qualified as guardian he went to see Miss Bean and that she was waving her hands and raising her feet as if she were climbing a ladder. Witness learned of Ann's property mostly from her sister Mrs. Pugh. Before he had been appointed guardian he hadn't seen Ann for twenty years.

Etta Bean testified that Dr. Schallern told her that Ann was not capable of taking care of her property and that a guardian should be appointed. This was on July 6, 1910. The day after she was burned she was very weak. Her mind wasn't as strong as it had been. She seemed to know witness, but was not able to converse. Saw her on the 7th of July. She didn't seem to be rational. Would ask kind of queer questions about things that hadn't happened. Said she had been by witness' place, and she had not, and asked about a new house in a certain place where there was no new house

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built. Asked about an old lady who had died several years before and who she knew was dead. This witness detailed various visits made to Miss Bean up to the time of the application for the appointment of a guardian on July 8th, and testified to actions and talk of Miss Bean which indicated that she was not of sound mind. On the 9th the witness served notice of the application for a guardian on Ann and found her in a nervous, excitable, and very poor condition to understand. She did make her understand, however, what it was. It took a few minutes. Saw her again on July 16th, when she appeared quite stupid, and again on July 25th, when she seemed to get wild and screamed and said "'I am afraid of you,' and tried to climb the wall." Did not go there after that.

E. W. Weisbrod, an attorney residing in the city of Oshkosh, knew Ann since 1905. In August, 1909, at the request of Mrs. Davis, who was a sister of Ann and Mr. Pugh, witness went to place where Ann was staying to draw her will. Spent considerable time with her trying to ascertain whether she knew anything about the extent of her property or knew enough to make a testamentary disposition of it. Was unable to get anything out of Ann that would enable him to draw her will, and he states that at that time she was mentally incompetent to make a will. He went to her home on July 9, 1910, at the request of Mrs. Davis, for the purpose of drawing her will. At this time she was lying on the cot all bandaged up and did not recognize him. Couldn't make her realize who he was. Tried to talk with her about her business. "She never understood a word I was talking about." "She didn't seem to comprehend what I came for." Tried to talk of her property and of her relatives and who she wished to leave her property to. Didn't get any expression from her along that line whatever. Remained possibly an hour with her and tried to get a statement from her from which to draw her will. Didn't draw her will because he couldn't get the

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information. "The woman was physically incapable. She didn't have the capacity to understand. She was very childish to me. She talked childish, it was on that crying and whining order, kind of melancholy I would call it." "I gave it up as useless." She was much worse than she had been in the previous August.

Two physicians, Doctors Russell and Brown, testified, in answer to a hypothetical question, that Miss Bean was demented and that they did not consider that she was mentally competent to transact business or make a will on July 13, 1910. The nature of her ailment was said to be senile dementia. The characteristics of the disease were said to be loss of memory, especially of recent events, inability to recall things that recently occurred, liability to make appointments and forget them, and to dispute correct bills or want to pay them a second time, inability to carry on an extended conversation, incoherence, failure of will power, stubbornness at the beginning of the disease, extreme feebleness and childishness toward the end, inability to call familiar objects by their right names, extreme penuriousness, hallucinations, and crying fits. Often those affected become immoral. Dr. Russell said sometimes the disease developed slowly, so that it would be a series of years before it became apparent to onlookers. In other cases it develops quite rapidly. Usually it would develop in a year or two. After one begins to have hallucinations he or she would be incompetent to make a will, although such a person might be pretty bright on some subjects at times. Dr. Brown testified:

"My answer to the hypothetical question included all the conditions in the question and as of the last time mentioned in that question. That was through and including some time in 1911. I don't think a person would have mental capacity sufficient to hold together in their mind what their property was or the natural objects of their bounty, in this individual case. I couldn't state for how long a period before that."

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These two physicians were no doubt both capable and honest, and no just criticism can be made of the testimony given by them. Their opinion was based on an assumed state of facts. Every particle of evidence on which the proponent relies was excluded from the question, and some of the facts stated therein have no satisfactory evidentiary basis. Taking all of Dr. Brown's evidence, it is doubtful as to whether he thought she was incompetent when the will was made. Dr. Russell's evidence indicated that the disease was slow in developing, and that it might be difficult to determine when the border line between sanity and insanity had been passed, but he thought that after the hallucinations began the mind was insane at all times.

If we correctly understand the evidence of the physicians, old-age insanity seldom comes on suddenly. There is a gradual weakening or breaking down of the mental faculties, which is ordinarily slow and invariably progressive. The mind gradually loses its alertness and power of concentration until it is no longer capable of forming an intelligent judgment. When that period arrives, it is probable that there are no lucid intervals, although the person afflicted may be brighter at some periods than at others. 1 Wharton & S. Med. Jurisp. sec. 699; 2 Tuke, Dict. of Psychological Med. p. 872; 3 Witthaus & B. Med. Jurisp. etc. 221, 257, 263.

The question here is: What was Ann Bean's mental condition on July 13, 1910? The county court thought that she was suffering from senile dementia when she died and that the disease had progressed so far when the will was made that she was not able to appreciate the kind and amount of property which she had nor to intelligently select the objects of her bounty.

The circuit judge in his opinion stated that under certain decisions which he cited he would be inclined to hold the testatrix competent were it not for the guardianship proceed-

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ings, the force that he thought should be given to sec. 3979, Stats., and the decision of the county court.

The evidence tending to show mental incompetency when the will was made is weak. The deliriousness and incoherence testified to after Miss Bean was seriously burned are well accounted for by the fact that she was suffering intense pain from her burns. If for the moment we pass the testimony of Mr. Weisbrod and Mrs. Etta Bean, little was shown except forgetfulness on the part of the testatrix, who was about seventy years old when the will was made. There are a whole lot of people who are forgetful long before they reach this age and who have an annoying habit of asking the same question more than once, but who are not insane. True, she did not recognize some people who called on her. But she had been totally blind for twenty-five years. The testimony of Etta Bean relates to the condition of Ann after she was burned, and she admits that Ann's mental condition seemed to improve after her burns began to heal up.

The strongest item of evidence produced by the contestants was that given by Mr. Weisbrod. When he visited Miss Bean in 1909 she was either insane or was shamming insanity, according to his evidence. There are some indications that she was shamming. At this time she was away from home visiting relatives and had expressed no desire to make a will, nor, as far as we can learn from the record, sent for Mr. Weisbrod for this or any other purpose. He seems to have been sent at the instance of her sister Mrs. Davis. Whoever sent him must have thought that she was competent to make a will. She was blind and feeble and away from home among relatives who were apparently anxious that she should make a will that would redound to their benefit and one which in all probability she did not want to make. If she was insane in August, 1909, with an incurable form of insanity which admitted of no intervals of lucidity, it is strange that no one else found her in any such condition until she was burned

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early in the following June. Mr. Weisbrod came to see her again, at the instance of Mrs. Davis, four days before she made her will. He could not get her to talk and thought she was worse than when he saw her the preceding August. This evidence is significant, although it might be said that Ann did not want Weisbrod to draw her will and did not send for him.

Giving due weight to the evidence of Mr. Weisbrod and to that of the other witnesses who were produced by the contestants, we think the clear preponderance of the evidence is to the effect that Miss Bean had testamentary capacity on July 13, 1910. Her family physician should know more about her condition than any one else, and there is nothing to show that he had any interest or bias in the matter. The experience and training of physicians is such that they ought to be able to form reasonably correct conclusions on the condition of a person's mind. It is on the result of their judgment and experience that alleged insane persons are committed to our state institutions. If all of the testimony had been before Doctors Russell and Brown and they then expressed the opinion that she was insane when she made what purported to be her will, their opinions would have much countervailing weight. As it is, while their evidence was competent and proper, its probative force was very small. Nineteen out of every twenty persons would probably express the opinion that Miss Bean was insane, if they had before them only the matters stated in the hypothetical question and assumed them to be true. It seems to us the figures would be pretty nearly reversed if these same persons were asked for an opinion based on the entire evidence. The evidence of Doctors Schallern and Hall was strongly corroborated by a number of witnesses who had frequent opportunities to observe Miss Bean's condition and who were disinterested. The case on its facts is to our minds weaker than that made by the contestants in the *Blakely Will Case,* 48 Wis. 294, 4 N. W.

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337, where the decision of the circuit court was reversed and the testatrix was held competent to make a will. The *Cole Will Case,* 49 Wis. 179, 5 N. W. 346, presented a still stronger showing of mental incompetency, although it is proper to state that in this case, as well as in the *Silverthorn Will Case,* 68 Wis. 372, 32 N. W. 287, the wills were sustained in the circuit court.

As we read the decision of the circuit judge, he would have sustained the will were it not for the guardianship proceedings and the provisions of sec. 3979, Stats.

The first consideration would ordinarily be quite persuasive. It has no force here that we can see, because the evidence taken before the county judge in the guardianship proceedings is before us, and shows that the appointment was sought because of physical and not mental disabilities and that no guardian should have been appointed on the showing made.

Sec. 3979 provides that after the order for notice has been issued, the petitioner may cause a copy of the petition, with a copy of the order for notice, to be filed and recorded in the office of the register of deeds, and if a guardian shall be appointed upon the application, all contracts except for necessaries at reasonable prices, and all gifts, sales, and transfers of property by the incompetent after such filing, shall be void.

The trial court was of the opinion that a legacy is a gift and that if the statute had been followed Miss Bean would absolutely have been precluded from making a valid will, and that the policy of the statute is to prevent the making of valid wills during the pendency of guardianship proceedings, provided a guardian is appointed under them.

We do not construe the statute as applying to wills or legacies provided for by the will. Its object and purpose seems to be to prevent an incompetent from disposing of his property so as to place it out of his control and beyond his recall during the pendency of the guardianship proceedings.

The amendment of what is now sec. 4041*b*, Stats., by

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ch. 231 of the Laws of 1909, by dropping out the word "arising," was evidently made to avoid the decision of this court in *Gertsen's Will,* 127 Wis. 602, 106 N. W. 1096. It is at least proper for this court under the statute as it now stands to fix the amount of attorney fees that shall be allowed for work done in this court. The executor is directed to pay his attorneys the sum of $100 for such services besides actual disbursements for prosecuting the appeal. No costs are awarded the contestants.

By the Court.—The judgment appealed from is reversed, and the cause is remanded with directions to admit the will to probate.

EMOND and wife, Appellants, vs. KIMBERLY-CLARK COMPANY, Respondent.

November 18—December 8, 1914.

Negligence: Pleading: Conclusion of fact: Ponds on private grounds: Danger to children: Duty to fence.

1. To allege in a complaint that a thing is unsafe without specifying how or why it is unsafe, is to state a mere conclusion and is not sufficient.
2. As to trespassers, useful or lawful structures or objects upon one's own land may, in the absence of active negligence at the time of the injury, be maintained and used in the customary manner in which they have been in the past, provided such maintenance and use is not so obviously dangerous as to partake of the nature of gross negligence.
3. In the absence of special danger or peculiar circumstances there is no breach of duty to the public in leaving unfenced a pond of water located on private property; and the attractiveness of the water or its nearness to a public highway does not take it out of the rule unless it is so located as to endanger the safety of children or other persons using the highway.
4. So *held* as to an artificial pond, one end of which adjoined a highway while from the other end, about forty feet away, the water flowed over a gate in a dam in a way alleged to have been peculiarly attractive to children,—the action being for death of a child who fell from the dam and was drowned.

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APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Action to recover damages for the death of the minor son of plaintiffs. Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. Its material allegations are as follows:

"That on the 17th day of December, 1913, and for a long time prior thereto, said defendant was engaged in the paper manufacturing business, and had one of its principal plants located in the village of Niagara, Marinette county, Wisconsin. That the defendant company, for the purpose of obtaining water for fire protection, had constructed a dam in close proximity to the main street in the village of Niagara, upon land owned and occupied by said defendant, and had thus caused a pond or pool about 30 x 40 feet to be formed, one end of which adjoined said main street of the village of Niagara, which was a public highway; that the said defendant had located in and as part of said dam, a certain overflow gate over which the water flowed in such a manner as to be peculiarly attractive and alluring to children of tender age; that said overflow gate was so constructed, located and of such a nature as to be particularly dangerous and hazardous to children of tender years, attracted and allured on said dam by said water falling over said gate; that said dam was located near the main street of said village and easily discernible and accessible to children passing along said main street; that the water on the pond side of the overflow gate was deep and roily.

"That there were at all times hereinafter mentioned, and for a long time prior thereto, many families having children of tender age, living in the vicinity of said pond, and that the children of said families were accustomed to pass, repass and play along said pond, and upon said dam and overflow gate; that they were in the habit of throwing sticks in said pond and watching them go over the overflow gate; that the public had used the top of said dam and overflow gate as a path or short-cut from the main street to the lumber piles, and that numerous children had fallen into said pond while playing upon said dam and overflow gate, all of which facts this defendant well knew; that the defendant owed to the children upon said lot and dam as aforesaid, the duty of using reason-

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able care, skill and diligence to prevent said children from going upon said dam and overflow gate, and to properly fence, guard and barricade said pond, and to properly guard said dam and overflow gate, and to repair and keep said overflow gate and dam in reasonably safe condition. That nevertheless the defendant wholly failed to use due care, skill and diligence to prevent the children from falling into said pond; that it wholly failed to fence, barricade and guard said pond, dam and overflow gate, and allowed it to remain in an unsafe condition.

"That on or about the 17th day of December, 1913, Austin Emond, the four-year-old son of *George* and *Ida Emond,* plaintiffs herein, while on said dam, in pursuance to the implied invitation of this defendant, and allured there by the attractiveness of said overflow gate, pond and waterfall and solely because of the negligence of said defendant hereinbefore mentioned in failing to guard said pond and overflow gate, in failing to use due care to prevent children from falling into said pond, and in allowing said overflow gate and dam to be in an unsafe condition, said Austin Emond was precipitated into said pond and was drowned.

"That in consequence of the premises the above entitled plaintiffs have lost the services and support of their child, which they would have received but for the negligence of this defendant, to their damage in the sum of seven thousand five hundred dollars ($7,500)."

Plaintiffs appealed from a judgment sustaining the demurrer.

For the appellants there was a brief by *Martin, Martin & Martin* and *G. F. Clifford,* and oral argument by *Mr. Clifford.* They contended, *inter alia,* that the fact that part of the pond extended to the side of the highway created the duty of fencing the pond. *Klix v. Nieman,* 68 Wis. 271, 32 N. W. 223; *Meibus v. Dodge,* 38 Wis. 300; *Busse v. Rogers,* 120 Wis. 443, 98 N. W. 219; *Compty v. C. H. Starke D. & D. Co.* 129 Wis. 622, 109 N. W. 650; *Meyer v. Menominee & M. L. & T. Co.* 151 Wis. 279, 138 N. W. 1008; *Lomoe v. Superior W., L. & P. Co.* 147 Wis. 5, 132 N. W. 623; *Kelly v. Southern Wis. R. Co.* 152 Wis. 328, 140 N. W. 60; *Harris v. East-*

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ern Wis. R. & L. Co. 152 Wis. 627, 140 N. W. 288. For cases generally on the liability of children falling into a pool on private property, see *Pekin v. McMahon,* 154 Ill. 141, 39 N. E. 484; *Price v. Atchison W. Co.* 58 Kan. 551, 50 Pac. 450, 62 Am. St. Rep. 625; *Brinkley C. Co. v. Cooper,* 60 Ark. 545, 31 S. W. 154, 46 Am. St. Rep. 216; *Franks v. Southern C. O. Co.* 78 S. C. 10, 58 S. E. 960, 12 L. R. A. N. S. 468; *Donk Bros. C. & C. Co. v. Leavitt,* 109 Ill. App. 385; *Tucker v. Draper,* 62 Neb. 66, 86 N. W. 917; *Brown v. Salt Lake City,* 33 Utah, 222, 93 Pac. 570.

For the respondent there was a brief by *Hooper & Hooper,* and oral argument by *Moses Hooper.*

VINJE, J. The appeal presents the question of whether or not it was the duty of the defendant to fence the pond described in the complaint. Fairly construed the failure to fence or guard it is the only negligence alleged. Upon the oral argument it was claimed by plaintiffs' counsel that the allegation that the pond, dam, and overflow gate were allowed to remain in an unsafe condition was the assertion of a breach of duty additional to the duty to fence or guard. If such a meaning can be gathered from the allegation it adds nothing to the complaint, for in the absence of an averment stating in what such unsafety consisted it is but the allegation of a conclusion to be drawn from facts. To allege that a thing is unsafe without specifying how or why it is unsafe is tantamount to an allegation that a person is negligent without stating the facts constituting the negligence. It is for the pleader to state the facts showing a want of safety or negligence, and it is for the court or jury to draw the conclusion that a thing is safe or unsafe or a person is negligent or not from the facts pleaded or in evidence. The facts upon which the negligence or unsafe condition are predicated should be pleaded and not the conclusion to be drawn therefrom. So we are limited to a consideration of the facts averred, namely, the failure to fence, in passing upon the sufficiency of the complaint.

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Stripped of verbiage describing the attractiveness of the pond to children, we have a body of water forty feet long and thirty feet wide situated upon defendant's land, with one end adjacent to a highway and the other end remote from the highway containing the dam and overflow gate or spill. There is nothing peculiar either in size, construction, or location of the pond. Hundreds of bodies of water both larger and smaller and equally attractive dot the whole state. And they take their toll of human life, especially of children, both in winter and summer. But it has not yet been deemed to be the duty of the owners thereof to fence or barricade them so as to exclude the public therefrom. Bodies of water like the one in question either natural or constructed by a dam or otherwise are useful and lawful objects whether located wholly within private lands or adjacent to a highway. Their usefulness would often be seriously interfered with if not entirely destroyed by a fence; especially so of ponds located on farms where they furnish water for stock. Generally speaking it is true, as stated in defendant's brief, that every drop of water except that in the washbowl is attractive to children, and it is also true that all bodies of water deep enough to drown a child and situated within roving distance of children present a danger from which an injury to some person or death may reasonably be anticipated. But it does not follow from such fact that a duty on the part of the owner to fence or guard springs therefrom. There are many useful, lawful structures and objects of which the same is true. One having a grove of trees, especially be they nut-bearing trees, may reasonably anticipate that a boy may climb one and be injured. Such occurrences are by no means rare. But would any one claim that he must fence or guard his trees lest an injury to a child might result? The difference between an attractive lawful object and an attractive nuisance must not be overlooked.

A certain amount of danger apparent to the mature mind inheres in the very existence of many useful objects both nat-

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ural and artificial that surround our daily life. When the risk resulting from their use or existence is no greater than is reasonably necessary for their proper enjoyment by the owner, it is one we must assume as a condition of living. All efforts to minimize danger are commendable. But in so far as they are compulsory they must remain within the realm of what is fairly reasonable, and that is especially true of duties owing to trespassers. As to them, useful or lawful structures or objects upon one's own land may in the absence of active negligence at the time of the injury be maintained and used in the customary manner in which they have been in the past, provided such maintenance and use is not so obviously dangerous as to partake of the nature of gross negligence. *Zartner v. George,* 156 Wis. 131, 145 N. W. 971.

The world cannot be made danger-proof—especially to children. To require all natural or artificial streams or ponds so located as to endanger the safety of children to be fenced or guarded would in the ordinary settled community practically include all streams and ponds—be they in public parks or upon private soil,—for children are self-constituted licensees if not trespassers everywhere. And to construct a boy-proof fence at a reasonable cost would tax the inventive genius of an Edison. Heretofore it has been the judgment of this court that, in the absence of special danger or peculiar circumstances, there is no breach of duty to the public in leaving unfenced a pond of water located on private property. The attractiveness of the water or its nearness to a public highway does not take it out of the rule. *Klix v. Nieman,* 68 Wis. 271, 32 N. W. 223. The conclusion reached in that case is adhered to. It is alleged that the boy fell in while on the dam. So he had left the highway and traveled some forty feet before he fell into the water. Were the pond so located as to endanger the safety of children using the highway as were the block and tackle in *Kelly v. Southern Wis. R. Co.* 152 Wis. 328, 140 N. W. 60; or were it a hidden death-deal-

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ing trap like the electric wires in *Meyer v. Menominee & M. L. & T. Co.* 151 Wis. 279, 138 N. W. 1008; or an obscured pitfall in a licensed pathway as in *Brinilson v. C. & N. W. R. Co.* 144 Wis. 614, 129 N. W. 664, a different rule would apply. Here we have nothing but a body of water in an ordinary state, such as it is often left in by nature, and, though attractive to children, there was no duty to fence it. The demurrer was properly sustained.

By the Court.—Judgment affirmed.

KERWIN, J., took no part.

BLOEDE, Respondent, vs. LUTZ, imp., Appellant.

November 18—December 8, 1914.

Conveyance in fraud of creditors: Husband and wife.

A finding that a conveyance of land by husband to wife was made in fraud of creditors is *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

David C. Pinkerton, for the appellant.

For the respondent there was a brief by *Churchill, Bennett & Churchill* and *P. J. Winter,* and oral argument by *W. H. Bennett.*

WINSLOW, C. J. This is an action in equity brought by a judgment creditor of one Lutz to set aside a deed of certain lands made by Lutz to his wife because made in fraud of creditors. The trial court having found upon ample evidence that the deed was made with the fraudulent intent charged on the part of both Lutz and his wife, the judgment must be affirmed.

By the Court.—It is so ordered.

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WILLIAMS, Appellant, vs. HICKS PRINTING COMPANY and another, Respondents.

November 19—December 8, 1914.

Libel: Newspaper article: Malice: Conditional privilege: Instructions to jury: Evidence: Other publications: Opinions: Offer to retract: Damages: Mitigation.

1. Whether a particular publication would ordinarily be so understood as to be libelous is generally a question of law, although sometimes the characterizing circumstances are such that it is a question of fact, or of mixed law and fact.
2. If a newspaper article naturally tends to make a person appear ridiculous or contemptible or a subject of hatred, or to disgrace him in society or injure him in his business, the right to recover general damages follows as a matter of course, in the absence of truth as a justification or of circumstances of legal excuse.
3. Mere good faith, honest belief in the truth of the publication, good motives, accident, or inadvertence is not of itself a defense or sufficient to mitigate the actual damages recoverable.
4. Conditional privilege as regards newspaper publications does not go beyond fair criticism in respect to the relations of persons to the public and report of facts. It does not extend to false statements of fact or unjust inferences, nor taunts, nor contemptuous and insulting phrases.
5. A newspaper article in which a reputable lawyer, long in practice and of high standing, was referred to as "an attorney who seems to be entirely ignorant of the first principles of decent courtesy or fairness," as a "puny little member of the bar," and as a "legal neophyte," was libelous as a matter of law.
6. In an action based on such article, no justification having been shown and there being no evidence to indicate that plaintiff's character was not such as to be affected in the ordinary degree thereby, and affirmative evidence that the injury was possibly above the ordinary, it was error to refuse to instruct the jury that the article was libelous *per se* and that plaintiff was entitled to recover his actual damages regardless of whether the publication was made with bad motives or not; and the jury should further have been made to appreciate that nothing short of substantial damages within the field of general damages would be adequate to the case.
7. It was error in such case to refuse to receive in evidence other articles published in defendants' newspaper leading up to the one

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in question, and articles subsequently published up to the time the case went to the jury, all of which had a material bearing upon the questions of malice and punitory damages.

8. For the publication of such articles during the trial, defendants should have been reprimanded and perhaps punished by the trial court.

9. It was error to permit defendants' witnesses to testify to their conclusions, opinions, and impressions in respect to the occurrences before the board of review with reference to which the libelous article was published, and to refuse to permit plaintiff to prove just what was said and done before the board of review.

10. It was error, also, to permit one of the defendants to testify as to what he meant by the use of the particular expressions used in the libelous article and his conception of his duty and his rights as a newspaper publisher, or at least such testimony should have been confined to the question of exemplary damages. What the author intended, in such a case, is immaterial on the question whether the article is libelous or what sum of money will measure the loss caused.

11. An offer by defendants to retract any statement in the libelous article if plaintiff would produce to them satisfactory proof of its incorrectness, and to publish any signed article plaintiff might furnish for that purpose, subject to such comments as defendants might see fit to make, the offer being accompanied by a suggestion of still greater humiliation of plaintiff if he resorted to legal remedies for redress, was not such an offer as should be considered in mitigation of the wrong, and the jury should, on plaintiff's request, have been so instructed.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Action to recover damages for a libelous publication in a newspaper printed and circulated in the city of Oshkosh, Wisconsin.

Defendant corporation was the owner of the newspaper. Defendant *Hicks* was the principal stockholder and practically controlled the corporation. Both were participants in the alleged wrong. Plaintiff was a lawyer in good standing and it was claimed that the article in question was wilfully and maliciously composed and published with intent to injure him in his good name and fame as a lawyer and to bring

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him into public contempt and ridicule. The complaint contained allegations to the effect stated, also all essential allegations to support a recovery, including a copy of the article, as follows:

"The Rumpus Over Assessments.

"For the past three weeks, the business men of Oshkosh have been more or less wildly excited over a discussion at the city hall on the subject of valuation of the property on which taxes are to be levied next December.

"The whole thing was precipitated by the action of S. Heymann Co., proprietors of the largest department store in the city. The company felt aggrieved because it believed that its valuation, both real and personal, had been placed too high, and through its attorney, it began an aggressive campaign against fifteen or twenty large business concerns, demanding in no uncertain terms that the assessed valuation of the other concerns should be largely increased.

"The Northwestern has published from day to day an impartial report of the proceedings, as it always does everything that interests the public, but until now it has refrained from any editorial comment for the reason that it had no desire to unduly influence the tax court which was investigating the matter. Now that the public inquest is practically finished it feels at liberty to speak its mind and discuss the subject, especially with reference to the effect of the movement on the prosperity of the city.

"When the department store began their movement to raise the assessed valuation of other taxpayers they were clearly within their rights. The law gives any one the legal right to hale into court a fellow taxpayer and make him admit that his property is worth more than it is assessed at, but among business men who value the good will of their neighbors and are familiar with the amenities of every-day life, such a task is at best an ungracious one, even if it is performed with tact, politeness, suavity and the good-natured courtesy which obtains among the well-bred people in the transaction of public business.

"But when such an inquisition is performed by an attorney who seems to be entirely ignorant of the first principles of decent courtesy or fairness, and respectable business men are

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brought into court by a police officer, openly accused of falsehood and the uttering of false documents, treated like confessed swindlers, badgered and snubbed until the court had to intervene for the protection of the victim, one can only wonder what the fuss is all about.

"It is only fair to assume that if the aggrieved party had gone with his attorney in a quiet and gentlemanly manner to the tax officials and shown that his property had been assessed too high his statement would have been received with candor and fairness, and undoubtedly he would have obtained at least a measure of relief. That is the method which the ordinary business man pursues and results usually justify the means.

"But the public will wonder how the interests of the party aggrieved can be advanced when his attorney, strutting for a few brief moments in the public eye, flippantly accuses the president of one of our oldest and most reliable manufacturing concerns of falsifying his inventory to escape taxation.

"The vice-president of another manufacturing concern testified on oath that the real and personal property of his company was assessed at $200,000 more than the company would sell for, and yet this puny little member of the bar tried his best to produce the impression that the company had juggled its inventories and made a bitter fight to get the company's valuation increased.

"In the case of another taxpayer, this attorney went so far as to actually make a proposition to buy the property in question, offering $150,000 'spot cash' for it in his overheated desire to prejudice the court. The humor of the situation may be appreciated when it is understood that the man who made the offer is one of those who rarely carried around in his pocket any such sums as $150,000. Possibly in his first essay as an attorney, with his first case in opera bouffe, he felt that it was necessary to rival the feat of the Indiana farmer who came to Chicago to see the sights and then purchase the eighteen-story building known as the Woman's Exchange for $300 which he carried safely in his inside pocket.

"It is unnecessary to review the case any further. The Northwestern is sorry for those manufacturers and business men who have fallen under the displeasure of this attorney, for it is not a very pleasant thing to be unjustly accused of

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fraud or disreputable practices. It is a principle in law that a man is innocent until he is proven guilty, but in the opinion of this legal neophyte every man he points his finger at in court is guilty of all manner of evil doing and all that remains is for the court to pronounce judgment. To him any one who opposes him is steeped in iniquity and unworthy of belief.

"It is difficult to see how the most disagreeable events of the last three weeks have helped anybody. The few dollars that may be lost or saved by an increase or decrease of one's valuation at taxpaying time will hardly be counterbalanced by the moral effects following the investigation. The good will of one's neighbors, the satisfaction of having them right, the comity of interests that exists between every business man in the community—all these things are worth considering and all of them have been sorely tried.

"We think we have made it quite plain that in the opinion of this paper, and we believe in the opinion of the public, the whole trouble has been caused by the injudicious actions of the attorney in question. The good name of Oshkosh has been publicly assailed and consequences are likely to follow that will seriously affect the prosperity of the city for all time.

"But it is possible that the client assumes full responsibility for the work of the lawyer. We shall not believe it, however, until we are compelled to."

Defendants admitted publication and joint participation therein as alleged, pleaded that it was neither false nor defamatory, and took issue on all allegations of the complaint as to their conduct being actionable. By way of excuse, justification, and mitigation of damages, this was, in effect, alleged: For some days prior to the publication, the board of review of the city of Oshkosh was in session in due performance of its duties. Plaintiff, as attorney for S. Heymann Co. and himself and by assumption, of all others similarly interested, appeared before the board and made objections to the assessments. The contest instituted and carried on by him was generally known and was of great public interest. In the proceedings aforesaid plaintiff was uniformly overbearing,

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opinionated, boastful, ungentlemanly, and unlawyerlike. He persisted in a course of intimidation of witnesses, accusing them of false swearing, of trying to avoid testifying, and of falsifying inventories, thereby creating much prejudice against some of them. His conduct was of the same character towards the board. He openly accused its members of improper conduct. He accused some persons of corrupt practices and dishonest conduct, in failing to appear before the board, and charged members of the board with being in collusion with such persons. His conduct created much excitement in the city of Oshkosh. During practically all the sessions of the board such conduct was unfair and insulting, both to taxpayers and members of the board, going to the extent of disregarding principles of common decency and carrying the idea that taxpayers whom he caused to appear were corrupt and dishonest, requiring the board, for its own protection and that of such witnesses, to rebuke him. His unfair conduct caused the board to exclude him from examining witnesses in the first instance. The article had reference to the matter aforesaid. It was printed in good faith and as matter of justice to the board and the persons unfairly dealt with before it by plaintiff. It was conditionally privileged on that account, and because it was but a fair statement of the facts and criticism of plaintiff's conduct.

Particularly in mitigation, defendants answered thus: Prior to the year 1913, customarily, property in Oshkosh had been assessed upon a uniform basis less than the true value. This was common in Winnebago county. The tax commission ordered its discontinuance. Thereupon the officials of the city of Oshkosh determined to obey such order and gave directions accordingly. Thereupon the assessor assessed the property in said city for taxes for 1913 at its fair value, resulting in a large increase of valuation in many cases, including property of plaintiff's particular client. That instigated such client to contest the matter as before indicated. Such

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contest was carried on in the manner aforesaid and was prepared for by arousing prejudice between classes of taxpayers and between them and the board. In all of this the plaintiff was the master spirit in connection with the principal owner of his client's corporation. Before the time for the hearing, plaintiff caused to be prepared and published and given wide circulation, misleading and prejudicial statements and comparisons respecting assessments. The first publication was headed thus: *"Assessed Valuation of Personal Property of Ten of the Largest Local Firms as Now Made by the City Council."*

Other articles followed with head lines appealing to the people as if they were in imminent danger of being greatly wronged. The suggestions of unfairness contained in such articles were made the subject of investigation by the board. The proceedings in that regard, because of the feeling created by the plaintiff, were of great public interest and discussion among the people. During the hearings before the board, defendants' company, by various publications, kept its readers informed of the occurrences. (In this connection the head lines of the articles were set out.) All such articles, as well as the particular one, were published in good faith without malice, as matter of news, and, in the whole, they contained a fair statement of the happenings to which they related. Before commencement of this action defendant company in good faith offered plaintiff free use of its paper for the purpose of replying to anything in the articles complained of and offered to make correction of anything he would point out which was not justified by the facts.

There was evidence on the part of plaintiff that he had been a practicing lawyer in Fond du Lac and Oshkosh, Wisconsin, for some seventeen years; that he was a man of family consisting of a wife and five children; that the ages of the children were fourteen, eleven, eight, six, and four; that he was a subscriber to the newspaper in question and, at the time

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the libelous article was published, the paper was read by members of his family.

To show malice plaintiff offered the several articles printed in defendants' newspaper relating to the subject of the particular article. In the main, they were published prior to the particular one and were pleaded in the answer for justification and mitigation. They included a repetition of the objectionable matter published during the trial. On objection they were excluded. This was followed by the court's refusal to permit appellant's counsel to comment on the pleaded articles in discussing the case to the jury.

There was testimony, unopposed, by six reputable members of the bar of Winnebago county, including the municipal judge, the county judge, and the district attorney, that plaintiff was a lawyer of high standing in the city of Oshkosh.

On behalf of the defendants, evidence was given to prove the allegations of the answer as to the circumstances leading up to the publication, particularly, the proceedings before the board of review. Such evidence was by persons who were called before the board at the instance of plaintiff, were adversary, were, with or without adequate cause, irritated to a high degree because of being cited to appear and by the course of the examination, and with whom defendants were in full sympathy by reason of belonging to the class who were bitterly opposed to the investigation being carried on, its property being among that particularly singled out as favored in the assessment.

The evidence of such witnesses was, in the main, general, as to plaintiff's conduct during the proceedings before the board and of the impressions it created upon them, instead of as to what he said and did and they said and did, leaving the question of propriety for the jury. Objections to this method of proving allegations of the answer as to reprehensible conduct of plaintiff were overruled.

Defendant *Hicks* testified and acknowledged responsibility

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for the publication complained of and the general course of the newspaper in relation to the matter. He said he had no personal knowledge of the subject dealt with in the article; that he obtained his information respecting it from articles published in his paper and conversations with citizens of Oshkosh whom he casually met. He was permitted to testify, generally, as to his motives in publishing the article and as to the proper sphere of a newspaper, and his opinion respecting his duty to the public to characterize the proceedings of plaintiff before the board, as he viewed it. He was also permitted to explain what he meant by the particular expressions used in the article; saying, substantially, that by the term "puny little lawyer" he intended to convey the idea that plaintiff was such as compared with the most eminent members of the Oshkosh bar, past and present; that the term "neophyte" was used to characterize plaintiff's conduct as excessively aggressive and enthusiastic in behalf of his cause; such term being ordinarily used to picture an over-active new religious convert, and that the reference to plaintiff's proposition to buy the newspaper property and pay $150,000 cash down for it and comment thereon, was a mere humorous way of ridiculing the idea of plaintiff being able to carry on such large financial transactions on his own account. There was further proof that, in articles published during the board proceedings, plaintiff was referred to as a "tax ferret" and his proceedings as "tax ferreting." Upon rebuttal plaintiff was refused permission to prove what was actually said and done before the board of review, in explanation of what his real conduct was and defense of the charge of discourtesy.

Evidence on rebuttal by several witnesses was given to the effect that plaintiff's conduct before the board of review was merely that of an attorney who was vigorously representing the interests of his client. That it was lawyerlike. That in the performance of his duty as he saw it, he irritated opposing witnesses, counsel, and members of the board and they,

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in turn, irritated him; that the honors were about equal in that respect; that there was a general atmosphere of hostility toward plaintiff and the cause he represented, for which the mayor of the city, who was presiding, was somewhat responsible; that plaintiff, from first to last, pursued, against such opposition, a purpose of showing what his client and what he believed to be injustice in respect to the assessment, and to secure such changes as would make the valuation equitable.

The cause was submitted to the jury under instructions permitting a finding in defendants' favor,—rejecting a request on the part of appellant that the verdict should be in his favor for, at least, compensatory damages, and that the attempt to prove an offer to retract had failed and that what was done in that line was not to be considered in mitigation, resulting in a verdict of no cause of action. Numerous exceptions were taken to the instructions which, so far as necessary, are stated in detail in the opinion.

A motion for a new trial was made upon several grounds including that, by a series of articles published in defendants' newspaper during the several days the action was on trial, the cause of defendants was advocated, the merits of the case misrepresented, and false statements were made; that such course of conduct continued from the first down to the time the jury retired to deliberate upon their verdict, and was continually in evidence before the jury through the papers coming to their notice and created prejudice against plaintiff. The motion was overruled and judgment was rendered for defendants on the verdict.

For the appellant there was a brief by *Williams & Williams,* attorneys, and *Moses Hooper,* of counsel, and the cause was argued orally by *Mr. Hooper* and *Mr. George E. Williams.*

For the respondents there was a brief by *Bouck & Hilton, E. J. Dempsey,* and *John F. Kluwin,* and oral argument by *Mr. Dempsey* and *Mr. Kluwin.*

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MARSHALL, J. The essentials of a libelous publication are too well established in the law to require discussion or even citation of authority. There is no difference of opinion, as we understand it, between counsel, or counsel and the court, in respect to the matter. Differences, commonly, in such field spring, not from what is libelous in the abstract, but whether the particular article would ordinarily be understood so as to have a libelous effect. That, generally, is a question of law, but sometimes the characterizing circumstances are such that it is a question of fact, or of mixed law and fact.

The law of libel is of much importance. In the field within which libelous activity may operate, great wrongs may be perpetrated, resulting in loss, sometimes beyond the competency of legal remedies to fully redress, because of there being no accurate standard by which the injuries can be accurately measured. In theory, that is wrong because, in contemplation of law, the collective judgment of a constitutional jury, guided by a wise judicial administrator, is our highest attainable ideal of justice and, so, must be deemed infallibly right in law, though morally it often is not. But it answers to the constitutional guaranty of "justice . . . completely and without denial . . . conformably to the laws." [Const. art. I, sec. 9.]

Character is man's choicest treasure. The wrongdoer who robs one of land or money or anything material, essential to his pursuit of happiness, is reprehensible and unworthy of a place in the social state, but one who intentionally robs another of his good character is a wrongdoer in a higher degree, from a moral standpoint, whether so recognized in the law or not. Life itself without worth-while character is of little or no value to its possessor or any one else, well said by Iago:

> "Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls:
> Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed."

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Thus it is evident that cases of this character are of no trifling nature, especially when the professional life of one is involved and the alleged assassin of it is a newspaper proprietor whose activities reach a wide circle, and who has come to be looked to for guidance of public thought. Such a person occupies a very high place in community life. His legitimate function is to inform, to educate, to entertain, to guide, to dignify the good by legitimate methods, to stand for truth and condemn error and, beyond and environed in these generalities, to satisfy the legitimate desires of the reading public,—never to maliciously accuse falsely, or blacken one's character nor expose him to public hatred, contempt, and ridicule, nor produce injury to him in his business, trade, or profession.

Thus, in general, malice is an essential element of libel, but not, necessarily, malice in the sense of actual ill will and intent to injure, constructive malice, so called,—perpetration of the act without lawful excuse—is sufficient. One need not go further on the subject of malice in proving a charge of libel than to prove the publication, unless the situation is such as to fall within the field of conditional privilege, and then malice in law is circumstantially rebutted and malice in fact, or express malice, as it is otherwise called, is required.

So it is not to be thought that mere good faith, honest belief in the correctness of the publication, or good motives, or accident or inadvertence, is, of itself, a defense, or even sufficient to mitigate as to actual damages, because such faith, belief, and motive are not inconsistent with malice in law arising, as a legal result, from the perpetration of the act of publishing an article, the natural tendency of which is to make its victim appear ridiculous or contemptible, or a subject of hatred, or to disgrace him in society or injure him in his business.

If a published article naturally tends, as suggested, the right to recover general damages follows as matter of course, in the absence of truth as a justification or circumstances of

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legal excuse, this, as indicated, not including mere negligence, accident, good faith, good motives, or sense of duty, except as said, in the field of conditional privilege where something more than implied malice is required. General damages, which so follow, may be added to by exemplary damages, upon proof of that actual malice which overcomes the protection of conditional privilege. Thus one cannot efficiently claim immunity from liability for damages inflicted by publishing with express malice a false and defamatory article, by putting up the shield of conditional privilege. *Joseph v. Baars,* 142 Wis. 390, 125 N. W. 913; *Arnold v. Ingram,* 151 Wis. 438, 138 N. W. 111.

The law as to what is within the field of conditional privilege and what is not, needs to be little discussed here, if at all. Such as it is, it applies to newspapers as well as to individuals. The freedom of the press has never been, and quite likely will not be, extended so as to accord to persons circumstanced as the respondents were special rights to injure or destroy human character by libelous publications. There is more reason for restricting the privilege respecting such particular class because of the special opportunity to do harm, than for extending it. Conditional privilege as regards newspaper activity does not go beyond fair criticism in respect to the relations of persons to the public and report of facts. It does not extend to false statements of fact or unjust inferences, nor taunts, nor contemptuous and insulting phrases. That is sufficient to condemn the article in question.

The foregoing stated principles need no support by citations. Applied to the facts of this case the article was libelous, as matter of law, and it is so conceded, though the concession is far too restrictive. It was replete with false statements of fact, contemptuous allusions, and sarcastic phrases, well calculated to humiliate, and it was devoid of all cast of fair comment. No one could read it and partake of its spirit without regarding its victim as of low degree as a

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citizen and lawyer; no one could be the butt of such ridicule without feeling a keen sense of humiliation and loss.

Counsel seek to minimize the wrong by claiming that the only false statement contained in the article is as to appellant being a "puny little lawyer." The article is to be looked at in its entirety, not in mere matters of detail. If it were true that several false detail statements were claimed and truth as to all but one was established, the article, as a whole, still being libelous, plaintiff would be entitled to recover substantial damages. But as we read the record the article, in general scope and details, stands without justification by proof of truth.

The evidence, without dispute, is that appellant was a reputable lawyer,—one of high standing,—who had been long in practice where the paper was published and circulated; that he was not a "puny little lawyer" in any sense of the word. He was not a "neophyte," a novice, a mere beginner. The suggestion, involved in the use of that term, has no basis in truth whatever. Neither was there any proof to show that appellant could not have bought the newspaper plant and made the offer legitimately. He seems to have had at least one wealthy client and may have had many who were quite willing to test the fairness of the assessment of such property by a *bona fide* offer to buy it at the stated price. The article indicated a studied attempt to belittle with insinuations and assertions which were the mere ebullitions of perverted partisan hostility to the efforts of appellant to serve his client's cause. In detail and entirety it is plainly libelous as matter of law.

As no justification was shown and the mitigating circumstances, if there were any, had no bearing on actual damages (*Candrian v. Miller,* 98 Wis. 164, 73 N. W. 1004; *Pellardis v. Journal P. Co.* 99 Wis. 156, 161, 74 N. W. 99), and there was no evidence to indicate appellant's character was not such as would be affected in the ordinary degree by such a wrong, while there was affirmative evidence that the degree of injury

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was, quite likely, above the ordinary, it was error for the trial court to refuse to instruct the jury that he was entitled to recover his actual damages and regardless of the question of whether the publication was made with bad motives or not. The jury should have been so instructed and, to guard against their committing error by finding merely nominal damages, they should have been made to appreciate that nothing short of substantial damages within the field of general damages would be adequate to the case. The law presumes, in such a case, that such damages were suffered as naturally and ordinarily flow from such a wrong under such circumstances. The standing of the injured one in the community is to be taken into consideration, his social station and relations, his business and its character, and all other circumstances bearing on the question. These are called general damages. There is no standard in law by which the loss in respect to such matters can be measured but the sound judgment of a constitutional jury under proper judicial guidance.

The trial court instructed the jury: "It is for you to determine whether the charges have been proven and were published from good motives and justifiable ends." That was error as has been indicated. The pleaded justification was not established in any substantial degree, and the jury should have been so plainly instructed instead of being left to find to the contrary and thus prevent appellant from obtaining the redress he was entitled to.

For the errors indicated the judgment must be reversed. Other errors were committed which were so involved in the particular one that, without being specifically referred to, they will not be likely to occur again.

There were still other errors committed which might or might not, by themselves be regarded as prejudicial to an extent requiring reversal. We will briefly refer to them to guard against the cause unnecessarily coming to this court again.

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Complaint is made because the court refused to receive in evidence several articles published in respondents' paper leading up to the particular one, and the articles published thereafter up to the time the jury retired to deliberate upon their verdict. That complaint is well taken. The pleaded articles were part of the record in the case. They were really in evidence without any formal offering. The ruling of the court refusing to permit them to be read was wrong. All of the articles had a very material bearing on the motives of respondents and the subject of punitory damages. The publications during the trial were circumstances of aggravation and might well have been considered quite persuasive in appellant's favor on the subject of malicious purpose to injure characterizing the particular publication. The late publications were especially reprehensible. The court should not only have allowed the circumstance to go before the jury as tending to prove express malice, but, promptly, upon the course of the paper being brought to its attention, it should have reprimanded respondents, and, in case of their persistency, administered proper punishment. The practice of newspaper proprietors when on trial for libel being permitted to reach the jury, day by day, during the trial through the columns of the journal is not to be tolerated. If attempted it should be met in such a way as to redress the wrong and prevent its re-occurrence. As well might a party to any trial reach the jurors by written or printed communications, or even by going among them and verbally discussing the case and giving direction to their thoughts.

Further complaint is made because the court permitted respondents' witnesses to testify to their conclusions, opinions, and impressions in respect to the occurrences before the board of review, and refused to permit appellant to meet them by proof of just what was said and done, leaving the question of whether that constituted palliation of the wrong charged. The conduct of the trial in this respect does not meet with

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our approval. The witnesses who were called before the board seem to have been quite offended, and particularly because of the course of their examination. All that might well be explained by their partisan hostility to proceedings which were perfectly legitimate. The material thing was whether there was just and adequate ground for the state of mind created by their experiences before the board. What was said and done was the test which should have been called for and, in the end, the jury should have been made to understand that, at best for defendants, the evidence bore only on the question of actual damages.

Respondent *Hicks* was allowed to testify, at length, as to what he meant by the use of the particular terms appearing in the article, his conception of his duty and his rights as a newspaper publisher. That course of the evidence, permitted under objection, was, in the main, wrong. How would persons ordinarily understand the article? That was the question and, in the circumstances as to the right to recover, it was not a jury question; and as to the extent of the jury respecting compensatory damages the mere notion or opinion of respondent *Hicks* was immaterial. The court should have rested the meaning of the article upon that which would ordinarily be attributed thereto and not permitted the jury to be confused by the mere opinions of the accused. It should, at least, have confined all such evidence to the field of exemplary damages. The rule has often been stated. How would such an article ordinarily impress readers of it under the circumstances of its publication and circulation? What one or more would understand, or did understand, or what the author intended is immaterial either on the question of whether the article is libelous or of what sum of money will measure the loss caused. *Bradley v. Cramer,* 59 Wis. 309, 18 N. W. 268; *Pandow v. Eichsted,* 90 Wis. 298, 63 N. W. 284; ***Arnold v. Ingram,*** 151 Wis. 438, 456, 138 N. W. 111.

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There was proof in support of the plea of an offer to retract, as a mitigating circumstance, that prior to commencement of the action, respondents offered to publish a retraction of any statement contained in the alleged libelous article upon appellant producing to them satisfactory proof of such statement being incorrect; that being accompanied by a suggestion of still greater humiliation of plaintiff in case of his resorting to legal remedies for redress, and also accompanied by an offer to publish any signed article appellant might furnish for that purpose, such publication to be subject to such comments as respondents might see fit to make. Counsel requested the court to instruct the jury that such circumstance should not be considered in mitigation of the wrong done to appellant and it was refused. No reason occurs to us why the jury should not have been so instructed. Proof of such circumstance was made by respondents upon the theory that it, in a measure, so atoned for the wrong done as to remove any ground for punitory damages. The matter seems to have been dealt with to the jury in a way to affect their judgment even in the field of actual damages. The circumstance did not constitute an offer to retract in any sense rendering it worthy of consideration by the jury. The communication reaffirmed what was asserted in the published article and, in effect, challenged appellant to combat it, with a threat that if he should seek a legal forum for vindication instead of the field occupied by the newspaper, he would run serious risk of further humiliation. It was rather a matter in aggravation than mitigation, and the requested instruction should have been given.

It is needless to say that error was committed after verdict, in refusing to set it aside as contrary to the law and the evidence, and we may well add, the question of whether error of prejudicial character was not committed in refusing to relieve from the verdict on account of misconduct of respond-

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ents during the trial, challenges serious attention. We may pass it without saying more, since more is not necessary for the case.

In harmony with what was said at the start, no particular effort has been made to reinforce the points made in this opinion by a citation of authorities. The questions are very few and very simple. The significant error is the refusal to charge the jury, plainly and unequivocally, that the article complained of was libelous *per se;* that the pleaded justification was not established and that appellant was entitled to recover substantial damages for the wrong done to him. Quite likely he was prejudiced in respect to a substantial award for exemplary damages by being precluded from proving the circumstances of aggravation involved in the general course of respondents down to the time of the jurors retiring to deliberate upon the case, and the course of the evidence, placing before them the opinions and impressions of witnesses instead of facts and the refusal to instruct, and emphatically, that the so-called offer to retract was not such an offer in fact and was rather proper to be considered on the subject of aggravation than mitigation or justification. With the particular treatment as to the dominating errors and the general treatment as to the others it is thought that none of those complained of need occur upon a second trial.

By the Court.—The judgment is reversed, and the cause is remanded for a new trial.

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GERMAN NATIONAL BANK, Respondent, vs. BARBER and another, Appellants.

November 19—December 8, 1914.

Bills and notes: Principal and surety: Surrender of security: Discharge of surety: Reviving liability by giving new note: Consideration: Banks and banking: Corporate stock: Conversion.

1. **Where a surety gives his note to take up one on which he is liable as a surety, with full knowledge that the property of his principal held by the payee of such note to secure payment thereof has been released and the right thereto relinquished, the surety's obligation continues and the note so given by him becomes a valid obligation; and such recognition of his liability does not require a new consideration.**
2. **Although a bank, which for the protection of itself and indorsers of the note held certificates of its own stock as security for payment of a note given by a subscriber for the amount unpaid on such stock, delivered the certificates to said subscriber without requiring payment of the note and without the knowledge or consent of the indorsers, and thereafter the stock was transferred to one of the officers of the bank, such facts did not show a fraudulent conversion of the stock which would entitle the indorsers to recover the value thereof from the bank, where the bank did not receive the proceeds of the transfer.**

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff to recover on four promissory notes made by the defendants. There is no dispute concerning them except as to the note made on April 1, 1910, for $670.

On the 21st day of March, 1892, one S. W. Hallock subscribed for five shares of the stock of the plaintiff bank and agreed to pay therefor the sum of $1,500. The defendants agreed with the officers of the bank that Hallock should give his note for $1,000 and the defendants should indorse the same. This was done and from time to time renewal notes indorsed by the defendants were given, and the note was reduced

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by payments of Hallock until in 1906 it amounted to only $635. At the time the original note was given it was agreed that the certificates of stock for the five shares should not be delivered to Hallock, but should be held by the plaintiff bank as security for the protection of itself and the defendants as indorsers, and this was done. On March 30, 1896, the plaintiff bank by its cashier, R. B. Evans, without the knowledge or consent of the defendants or without requiring the payment of the note by Hallock, at his request delivered the certificates of stock held as security for the plaintiff and defendants to him. On June 27, 1896, the plaintiff transferred said stock on the books to one G. W. Washburn, without the knowledge or consent of the defendants and without requiring payment of the note. In 1906, after Hallock had removed to New Mexico, at the request of the plaintiff bank the defendants gave their own personal note to the plaintiff to take the place of the old note given by Hallock and indorsed by defendants. The referee found that the defendants at this time had notice that the certificates of stock had been delivered up to Hallock more than one year prior to the execution of this note to the bank, and that the defendants thereafter, with full knowledge of such release of this security by the bank, from time to time gave renewal notes and paid the interest thereon and a part of the principal. The referee found that the plaintiff was entitled to recover the amount due on this note as well as the other notes sued on, and awarded judgment against the defendants for the sum of $3,671.18, together with all costs and disbursements in the action.

Motions were made by the plaintiff to confirm and by the defendants to set aside the report of the referee relative to this so-called Hallock note. The motion of the plaintiff for judgment was granted and that of the defendants denied, and judgment for the plaintiff in accordance with the findings of the referee was entered. From such judgment this appeal is taken.

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For the appellants there was a brief by *Barber Bros.*, attorneys, and *Charles Barber* and *H. I. Weed*, of counsel, and oral argument by *Charles Barber*. They contended, *inter alia*, that upon the undisputed evidence these defendants were voluntarily released by the bank from any obligation as indorsers on the note of Hallock when the bank surrendered the collateral without their knowledge or consent. The transfer of the Hallock stock to Washburn was not only the voluntary act of the plaintiff bank, but its deliberate act, and there can be no revival of a debt by subsequent promise when the creditor has voluntarily released the debtor, for the reason that there is no such moral consideration as will support a promise to pay. *Warren v. Whitney*, 24 Me. 561; *Ingersoll v. Martin*, 58 Md. 67; *Valentine v. Foster*, 1 Met. 520; *Hale v. Rice*, 124 Mass. 292; *Grant v. Porter*, 63 N. H. 229. Defendants had a right to recover from the bank for a conversion of the stock, or for a breach of contract in disposing of the same, or to have an accounting for the value of the stock and the dividends upon it. Whether the bank received money or not upon the sale of the stock, is immaterial. If it neglected to get the purchase price of the stock, that was a matter which concerned it alone. So far as defendants are concerned the case stands in exactly the same position as if the bank had received the money and held it in lieu of the stock.

For the respondent there was a brief by *Williams & Williams*, and oral argument by *George E. Williams*.

SIEBECKER, J. Upon the facts found by the referee the question is, Has the bank the right to enforce the note in question against the defendants? There is no dispute but that the bank surrendered to Hallock his stock without the knowledge and consent of the defendants. The surrender by the bank of the stock held by it to secure payment of Hallock's note, which the defendants indorsed as an accommodation, without the knowledge and consent of the defendants,

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undoubtedly operated to release the defendants from their obligation as indorsers of the Hallock note, had they insisted thereon when it came to their knowledge. They however did not insist on being released from their obligation on the note after having acquired knowledge of the release of the Hallock stock by the bank. A year from the time they were informed of the release of this security by the bank they continued their obligation by giving their personal note to the bank for the amount due on the original debt secured by their indorsement of the Hallock note. It is established in the law that if a surety gives his note to take up the one on which he is liable as a surety, with full knowledge that the property of his principal held by the payee of such note to secure payment thereof has been released and the right thereto relinquished, then the surety's obligation continues and the note so given by him becomes a valid obligation. 32 Cyc. 162, Waiver of defenses; *First Nat. Bank v. Jones,* 92 Wis. 36, 65 N. W. 861; *Mastin Bank v. Hammerslough,* 72 Mo. 274. Such recognition of his liability does not require a new consideration to sustain it. *Porter v. Hodenpuyl,* 9 Mich. 11; *Hooper v. Pike,* 70 Minn. 84, 72 N. W. 829.

The appellants contend that the release of the certificates of stock by the bank without their consent and the purchase thereof from Hallock by Washburn, one of the bank officers, constituted a fraudulent conversion of the stock and hence entitles them to recover the value thereof from the bank, for it presumably had the benefit of such value. This contention cannot prevail because the evidence sufficiently shows that the bank did not receive the proceeds of the transfer of the Hallock stock. The appellants' contention to the effect that the original debt of Hallock was fully discharged and satisfied by the surrender of the stock as shown by the evidence is not well founded. The referee's finding to the contrary must be accepted as a verity on this question. Whatever right the appellants had to insist on their release from liability as sureties

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on Hallock's note on account of the relinquishment of this stock by the bank was waived by them when they gave their note to the bank, continuing their liability, with full knowledge that the stock had been so relinquished as security for its payment. Under the circumstances shown the promise evidenced by the note in question is binding on the defendants, and the plaintiff is entitled to recover on the note.

By the Court.—Judgment affirmed.

FIRST NATIONAL BANK OF TIGERTON, Appellant. vs. HACKETT, imp., Respondent.

November 19—December 8, 1914.

False representations in sale of note: Tort action: Fraudulent intent not essential: Good faith: Evidence: Instructions to jury: Special verdict: Damages.

1. In a tort action based upon false representations in the sale of property plaintiff need not show that the representations were made with fraudulent intent.
2. Evidence in such case that defendant in good faith believed that the representations made were true is immaterial; but where plaintiff had introduced evidence on that question he cannot complain that defendant was allowed to rebut it.
3. Although in such case it was immaterial whether the representations were made in bad faith or not, yet, the action being based on fraud, it was prejudicial error to instruct the jury that there was no claim and no evidence of fraud or bad faith on the part of the defendant.
4. It was prejudicial error also to charge in such case that defendant denied that the alleged representations were made, where in fact defendant did not deny that any of the representations were made, except in a qualified way, and himself testified to making one of them.
5. An instruction that "It is a general rule of law that statements as to the value of property, real or personal, or as to the financial responsibility of persons, made for the purpose of inducing another to buy, may be and generally are mere expressions of opin-

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ions," was erroneous as applied to the evidence in this case and was prejudicial.

6. An instruction in this case from which the jury would be likely to understand that unless defendant positively vouched for the truthfulness of the statement made by him it would not constitute a false representation, was erroneous.

7. An instruction from which the jury would be likely to understand that plaintiff did not rely upon defendant's representation as to certain securities sold by defendant, but upon the defendant personally, was misleading in this case, that being under the evidence a question for the jury.

8. Statements by defendant not having been made as upon information or as matter of opinion but as positive statements of fact, it was misleading to charge the jury that if what defendant said "was a truthful statement of his information upon the subject, and given as such only," there was no false representation.

9. It being undisputed that a mortgage by which a note sold by defendant to plaintiff was supposed to be secured was in fact executed by a "dummy" as mortgagor, who had no title to the property and acquired none, and that such mortgage was worthless, it was error to give an instruction calculated to lead the jury to believe that if there was a contract between third persons and the defendant to perfect title in the dummy mortgagor it was sufficient to satisfy defendant's representation that there was a valid mortgage, although none in fact ever existed.

10. In a tort action based upon false representations as to the securities accompanying a note sold by defendant to plaintiff, it was immaterial whether or not the note would have been fully secured if plaintiff had subsequently agreed to an arrangement by which other securities were to be substituted, and no question upon that subject should have been included in the special verdict. Plaintiff had the right to stand upon the cause of action for fraud and was not bound to agree to the substitution of some other cause of action.

11. So, also, it was immaterial and no question should have been submitted to the jury as to whether plaintiff could at one time have sold the note for twenty-five cents on the dollar.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

This action was brought against the defendants to recover damages for false representations alleged to have been made in the sale of a note for the sum of $2,500. The complaint sets forth that on the 13th day of May, 1913, one Rose Rubel

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Hecht made a promissory note in the sum of $2,500, payable six months after date at the Old National Bank of Oshkosh, to the order of herself, with interest at six per cent. per annum; that the note was indorsed by her, A. S. Hecht, and J. F. Conant, who are named as defendants in the action; that none of the defendants named were served except *R. H. Hackett;* that said *Hackett,* as an inducement to the plaintiff to buy said note, made several representations, all of which were untrue, and that plaintiff was ignorant of the falsity thereof and relied upon such representations.

The defendant *Hackett* answered, denying the making of any false representation, and further set out in detail the history of the transaction and subsequent negotiations between the parties relative to the collection and security going with the note. It is further alleged that afterwards it was discovered that the securities were not as represented and the indorsers worthless and that further steps were taken by the defendant *Hackett* to obtain additional security of the other defendants and others, and that through the refusal of the plaintiff to surrender the note and accept new notes the deal fell through and the plaintiff, with other holders of other notes, lost an opportunity to collect or secure the same in full.

The jury returned the following verdict:

"(1) Did the defendant *R. H. Hackett,* at the time of the sale of said note to the plaintiff, make any false representations of a material fact or facts regarding the said note? *A.* No.

"(2) If you answer question No. 1 'Yes,' then was such false representation a material inducement to the plaintiff to purchase said note? *A.* ——.

"(3) If you answer question No. 1 'Yes,' then answer this: Did the plaintiff in purchasing said note rely upon such false representation and believe it to be true? *A.* ——.

"(4) If the plaintiff had agreed to the arrangement with Siegmund Hecht under date of December 3, 1912, would the plaintiff's note have been fully secured thereby? *A.* Yes.

"(5) Could the plaintiff at the time of the sale to the Stev-

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ens Point Bank have realized about twenty-five per cent. upon its claim? *A.* Yes.

"(6) What is the present value of the plaintiff's note? *A.* We believe twenty-five cents on a dollar."

The appellant made the ordinary motions after verdict and also filed exceptions to rulings of the court and to the charge and refusals to charge, which so far as necessary will be considered hereafter. Plaintiff's motions were denied and defendant's motion for judgment granted, and judgment was entered accordingly in favor of the defendant dismissing the plaintiff's complaint with costs, from which judgment this appeal was taken.

For the appellant there was a brief by *Goodrick & Goodrick,* and oral argument by *A. B. Goodrick.*

For the respondent there was a brief by *Charles and Henry Barber,* and oral argument by *Charles Barber.*

KERWIN, J. The appellant assigns the following errors: (1) The court erred in admitting testimony against plaintiff's objection. (2) The court erred in charging the jury. (3) The court erred in overruling plaintiff's alternative motions. (4) The court erred in overruling plaintiff's motion for a new trial.

The action is brought to recover damages for false representations alleged to have been made by defendant *Hackett* in the sale of a note to plaintiff. The complaint charges false representations made by defendant *Hackett,* reliance thereon by plaintiff, and damages. The answer puts in issue the allegations of the complaint. The verdict returned is set out in the statement of facts.

Briefly stated, the facts leading up to the sale of the note, so far as material to the questions involved, are substantially as follows: Defendant *Hackett* was a loan broker, president of the Farmers' Bank of Omro, stockholder in the First National Bank of Berlin, and stockholder in the plaintiff, *First*

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National Bank of Tigerton. Conant was a manufacturer at Two Rivers, Wisconsin, and was also interested in other business concerns. He entered into a deal with Albert Hecht and wife for the exchange or sale of certain property in Colorado. One Halliday, of Chicago, claimed to own land in Michigan which he desired to trade for Chicago property in which Conant had an interest. A written agreement was drawn up in April, 1912, by which it was agreed to exchange the Chicago property for the Manistee, Michigan, property upon conditions. Conant was to be paid a brokerage fee for consummating the deal. Hecht needed $8,500 to enable him to carry out the deal, but could not raise the money himself. Conant was brought into the deal and he needed $5,000. In other words, Hecht and Conant needed between them $13,500. To raise the money Conant applied to defendant *Hackett* and submitted a statement of the conditions of the properties and the parties. *Hackett* made two or three trips to Chicago in the matter and looked up the Rubel estate, in which it was claimed Rose Rubel Hecht was interested. There is evidence that *Hackett* thought Mrs. Hecht had a substantial interest in the estate. Under the deal made between Conant, Hecht, and *Hackett* in Chicago, an alleged mortgage on the property at Manistee, Michigan, for $6,500 was to be turned over to *Hackett,* the title to which property was not perfect, but there was a contract between Halliday and Hecht for the transfer of the property and providing that the actual transfer would be made within a short time. The papers were turned over to *Hackett,* including what purported to be a first mortgage upon the Michigan property for $6,500. The title to the mortgaged property was not perfect at this time, so that the $6,500 mortgage was not in fact a first mortgage, although defendant *Hackett* understood that part of the money which he paid was to be used by Hecht to clean up the title so that the mortgage would be a first mortgage. The securities were delivered to *Hackett* and the notes taken by him indorsed by

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Rose Rubel Hecht, A. S. Hecht, and J. F. Conant. Defendant *Hackett* also got a report of the financial standing of Conant. After it turned out that the title to the Michigan property was not perfected the defendant *Hackett* made a demand upon Conant and Hecht for $6,500 in cash. Some negotiations were had between Conant, Hecht, and defendant *Hackett* looking to a new arrangement whereby other properties were to be substituted for the Michigan property covered by the $6,500 mortgage, and the plaintiff was asked to enter into this deal, but refused to do so.

It appears that the deal entered into at Chicago by which defendant *Hackett* loaned $13,500 was what was termed a three-cornered deal between Hecht, Conant, and Halliday, by which certain properties were to be sold or exchanged and Halliday was to transfer to Hecht a farm of over 300 acres at Manistee, Michigan, in exchange for hotel property in Chicago. The deal was closed between *Hackett,* Hecht, and Conant May 13, 1912, and resulted in *Hackett* loaning Hecht and Conant $13,500, *Hackett* taking notes aggregating $15,500, viz. one note for $5,000, three for $2,500, one for $2,000, and one for $1,000. Defendant *Hackett* sold $14,500 of these notes, the one sold to plaintiff being one, and Conant sold $1,000. This paper was signed by Rose Rubel Hecht and indorsed by A. S. Hecht and J. F. Conant. A trust agreement was executed by which defendant *Hackett* was to be trustee. To secure the notes taken by defendant *Hackett* mortgages were taken by *Hackett* as trustee as follows: What purported to be a first mortgage of $6,500 on a Michigan farm and two second mortgages of $4,500 each on Colorado property. It seems that these mortgages were signed by one who had no title at the time, but who probably expected to acquire title thereafter. *Hackett* paid $13,500 to Conant and Hecht in Chicago May 13, 1912, and it appears from the evidence that defendant *Hackett* took the three mortgages on the strength of statements of the borrowers that subsequent

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to turning over the money deeds would pass which would make the mortgages, or some of them, good.

1. It is claimed by respondent that the action is on contract, and that there is no question of fraud in the case, that the appellant opened the door to the question of good faith on the part of *Hackett,* therefore cannot complain of the ruling of the court under the first assignment of error.

We think it clear under the pleadings and evidence that the action is not one upon contract, but in tort for fraud based upon false representations in the sale of property. But it does not follow that because the action is for fraud it must be shown, in order to make the representations actionable, that they were made with fraudulent intent. *Montreal River L. Co. v. Mihills,* 80 Wis. 540, 50 N. W. 507; *Cotzhausen v. Simon,* 47 Wis. 103, 1 N. W. 473; *Bird v. Kleiner,* 41 Wis. 134. A party making representations as facts must be held to respond for injury done in assuming to know and represent as facts things which did not actually exist, but upon which the other party relied to his damage. *Steckbauer v. Leykom,* 130 Wis. 438, 110 N. W. 217; *Standard Mfg. Co. v. Slot,* 121 Wis. 14, 98 N. W. 923. In speaking upon the subject in *Krause v. Busacker,* 105 Wis. 350 (81 N. W. 406), at page 354 this court said:

"If the representations were material and false, and the maker thereof either knew or ought to have known that they were false, or if he made them recklessly, with no knowledge on the subject, and the injured party relied upon them as true, without the present means of knowledge of their falsity, and suffered damage thereby, then the fraud is complete."

In *Zunker v. Kuehn,* 113 Wis. 421 (88 N. W. 605), at page 424 it is said: "False representations of facts or conditions which have induced the making of a contract may be actionable although not shown to have been made wilfully, or with fraudulent intent," citing *Montreal River L. Co. v. Mihills,* 80 Wis. 540, 50 N. W. 507; *Gunther v. Ullrich,* 82

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Wis. 222, 52 N. W. 88; *Porter v. Beattie,* 88 Wis. 22, 59 N. W. 499.

There is an abundance of evidence in this case that the representations complained of were made by defendant *Hackett,* and the question was not whether they were made in good faith, but whether *Hackett* did in fact make them, whether they were material and false, relied upon by plaintiff, and caused the injury complained of. The evidence admitted over plaintiff's objection and complained of under this assignment of error was as to whether *Hackett* in good faith believed the representations made were true. This evidence was immaterial and should not have been admitted. *Zunker v. Kuehn, supra; Krause v. Busacker, supra; Hart v. Moulton,* 104 Wis. 349, 80 N. W. 599; *Palmer v. Goldberg,* 128 Wis. 103, 107 N. W. 478. The plaintiff, however, called defendant *Hackett* under sec. 4068, Stats., and examined him respecting the security, and among other questions put the following: "You believed at that time, I presume, that this collateral security was good security for that loan?" This question was objected to as immaterial and the objection overruled. The evidence was immaterial, but the court permitted the question answered and thus opened the door for evidence of good faith on the part of defendant *Hackett.* There was other similar evidence on the subject offered by plaintiff and admitted over defendant's objection.

The plaintiff, having put in evidence upon this issue, cannot complain that defendant was allowed to rebut it.

2. The court charged the jury respecting the first question of the special verdict as follows:

"*Mr. Hackett* denies that any such representations were made. *Mr. Hackett* denies having told him any of these things as alleged in the complaint."

This part of the charge was misleading and prejudicial. The evidence shows that *Hackett* did not deny that any of the representations were made, except in a qualified way. One of the representations charged was "that said notes are fur-

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ther secured by a first mortgage of $6,500 on a tract of land containing about 300 acres near Manistee, Michigan, worth $16,000." The representations made by *Hackett* to the plaintiff bank were made by 'phone and in a conversation over the 'phone with Mr. Wojahn, cashier of the plaintiff bank. Defendant *Hackett* testified: "I told him I had a first mortgage for $6,500 on a tract of about 300 acres of land in Michigan estimated to be worth about $16,000, I think." *Mr. Hackett* afterwards makes a sweeping denial as to all of the representations, but from the evidence this appears to be based upon the fact, as he testifies, that when he talked with Mr. Wojahn over the 'phone Mr. Wojahn stopped him before he got through with all he desired to say regarding the securities.

The court further instructed the jury:

"In this case there is no claim of fraud or bad faith on the part of the defendant *Hackett,* and there is no evidence of fraud or bad faith on his part."

This was error and clearly prejudicial. The action was based upon fraud. If *Mr. Hackett* made the representations, which were material, and they were false, relied upon by the plaintiff, and caused the damage, it was immaterial whether they were made in bad faith or not.

The court further instructed the jury:

"It is a general rule of law that statements as to the value of property, real or personal, or as to the financial responsibility of persons, made for the purpose of inducing another to buy, may be and generally are mere expressions of opinions."

This was error as applied to the testimony in the case and prejudicial. *Palmer v. Goldberg,* 128 Wis. 103, 107 N. W. 478; *McKinnon v. Vollmar,* 75 Wis. 82, 43 N. W. 800; *Kathan v. Comstock,* 140 Wis. 427, 122 N. W. 1044.

The court further charged the jury:

"If *Mr. Hackett* in his conversation with Mr. Wojahn only truthfully stated his own knowledge upon the subject and did not make the statement as a positive and absolute fact and did

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not positively vouch for the truthfulness of the same, any statement so made, even if untrue, would not constitute a false representation."

It was not necessary that *Mr. Hackett* should vouch for the truthfulness of the statement made. It was sufficient that he made a positive statement of the facts and did not state it as being made upon information. From this charge the jury would be likely to understand that unless *Mr. Hackett* positively vouched for the truthfulness of the statement it would not constitute a false representation.

The court instructed the jury:

"The defendant also claims that Mr. Wojahn in his testimony admits shutting *Mr. Hackett* off and telling him that he might send the note, but with the understanding that he should be liable thereon."

This was not a correct statement of Mr. Wojahn's evidence. Wojahn testified:

"Then he began to tell me about the Greeley property, and I said there was no need going any farther. I did not know the indorsers or the securities. I says, I am kind of loaned up, I says, but I said if I can look to you at all times to see that the loan is made good, why send her along." . . . "One thing I haven't mentioned, that is: When I stopped him I said I did not know anything about the signers or indorsers or any of the securities that you mention to me, so I said get plenty of security for yourself for I will always look to you for payment of that note for the trustee. I didn't use the word 'trustee,' I said I will look to you. I am looking to him today."

The jury would be likely to understand from this charge that Mr. Wojahn did not rely upon representations as to securities, but upon *Hackett* personally. The instruction was misleading. It was for the jury to say upon all the evidence whether Mr. Wojahn did not intend to rely upon the securities as represented and not upon *Hackett* personally.

In charging as to the Michigan property the court said:

"If you find that the statements made by *Mr. Hackett* in regard to this property were true in substance, or that what

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he said was a truthful statement of his information upon the subject, and given as such only, you must find that there was no false representation in this regard, and as to this subject you must answer the first question 'No.' "

This instruction was misleading. What *Mr. Hackett* said about the Michigan mortgage was not said upon information or as matter of opinion, but was a positive statement of the facts, and the material question was whether the statements made by *Hackett* regarding the mortgage were true.

The court further instructed the jury:

"If at the time the mortgage was given there was a valid, binding contract which could have been enforced and whereby Mr. Halliday could have been compelled to have given a deed of the property, then there was in the eye of the law a valid mortgage upon the same. The mere fact that afterwards *Mr. Hackett* or the other parties neglected to enforce the contract, or by neglect lost rights in reference to the same, would not affect the validity of the mortgage at the time taken. If the mortgage was valid in law at the time the representation was made, you must find that there was no false representation in respect thereto."

This instruction was well calculated to lead the jury to believe that there was some kind of a contract which amounted to a mortgage on the Michigan property which might be enforced, and that if a contract in fact existed to perfect title in the "dummy" mortgagor, it was sufficient to satisfy the representation that there was a valid mortgage, although none in fact ever existed. It is undisputed that the $6,500 alleged mortgage on the Michigan property was executed by a "dummy" as mortgagor, who had no title to the property and acquired none, and that such mortgage was worthless.

Counsel for appellant also excepted to the whole charge as being too favorable to defendant *Hackett*. The portions of the charge heretofore treated show its general character and further discussion of it is unnecessary.

3. Error is assigned because the court refused to change the answer of the jury to the fourth question of the special

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verdict from "Yes" to "No." This question should not have been submitted and has no proper place in the case. The plaintiff had a right to stand upon its cause of action for fraud and was not obliged to enter into any negotiations resulting in a substitution of its existing cause of action for some other. All the evidence respecting this transaction should have been excluded and no question submitted to the jury upon the point.

Counsel for appellant also moved to change the answers to the first, fifth, and sixth questions of the special verdict on the ground that the answers to these questions are unsupported by the evidence. The issue raised by the fifth question was immaterial. Plaintiff was not obliged to sell the note for twenty-five cents on the dollar or for any sum less than face and interest. Plaintiff offered the note in court for the use of defendant *Hackett.*

Whether there was sufficient evidence to support the answers to the first and sixth questions of the special verdict we need not and do not determine.

On account of prejudicial error committed on the trial and discussed in this opinion the judgment must be reversed.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

STEINKE, Appellant, vs. CITY OF OSHKOSH, Respondent.

November 19—December 8, 1914.

Municipal corporations: Injury from defect in sidewalk: Notice of injury: Inaccuracy: Intention to mislead: Questions for jury: Evidence: Photographs, when not conclusive.

1. Since the amendment of sec. 1339, Stats., by ch. 85, Laws of 1893, the notice of an injury claimed to have been sustained by reason of a defect in a sidewalk is not rendered insufficient or invalid by failure to describe correctly the defect, if there was no intention to mislead the municipality and it was not in fact misled.

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2. Where such a notice described the defect as an incline in the walk, made of old and worn planks laid lengthwise so as to be slippery and unsafe to pedestrians, and both the notice and the complaint stated that plaintiff slipped on such incline and fell, but at the trial plaintiff testified that her injury was caused by stepping into a hole in the walk at the place described, and further testified that it was due to her lack of familiarity with the English language that she did not make her attorneys understand that she stepped into a hole, it was a question for the jury whether in giving the notice there was any intention to mislead the city; and upon evidence tending to show that the city was seasonably advised of the existence of the hole it was for the jury to say whether or not the city was misled.
3. A photograph of the walk at the place in question which, although it showed that there was a narrow piece out of the side of one of the boards, seemed to show that the space was too narrow to admit a human foot, is *held* not to be conclusive of the latter fact, although the plaintiff had the photograph taken, offered it in evidence, and vouched for its accuracy, where she also testified that her foot went through such hole and another witness testified that he examined the walk a few minutes after the accident and that the hole was there and was large enough to admit the plaintiff's foot.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Action to recover damages for injuries sustained by falling on an alleged defective sidewalk. The notice of injury stated that the plaintiff was injured by reason of a defective sidewalk and described the place where the injury occurred. The defect in the sidewalk and the cause of the injury are set forth as follows:

"That the dangerous, insufficient and defective condition of said sidewalk, which occasioned said injuries, consisted of an incline the width of the sidewalk at said point about six feet in length and made of old and worn planks laid lengthwise with the said walk. That said incline dropped about ten inches and leads from the new cement sidewalk on the south adjoining lot of the above described premises down onto the wooden plank sidewalk immediately north thereof. That said incline was dangerous, insufficient and defective in this,

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that the planks from which it was made were old and worn and laid lengthwise, thereby rendering said incline slippery and unsafe to pedestrians, and was entirely devoid of cleats to prevent persons stepping thereon from slipping and falling during wet weather. That as said *Augusta Steinke* was walking north on said sidewalk, with due care, she stepped upon the aforesaid incline and slipped, causing her to fall and sustain severe bodily injuries."

The complaint in describing the defect substantially follows the notice. There is some elaboration in it, but no averment that there was any hole in the sidewalk. On the trial the plaintiff testified that her injury was caused by stepping into a hole in the part of the sidewalk described in the notice. At the close of plaintiff's testimony the defendant moved to strike out the evidence tending to show that there was a hole in the sidewalk and for a nonsuit. Plaintiff requested the court to permit the complaint to be amended so as to conform to the proofs. The motion to amend was denied and a nonsuit was granted. Plaintiff appeals from the judgment of nonsuit.

For the appellant there was a brief by *Charles Oellerich,* attorney, and *M. H. Eaton,* of counsel, and oral argument by *E. J. Dempsey.*

R. A. Hollister, for the respondent.

BARNES, J. The circuit court obviously refused to amend the complaint because it was thought that it would not do plaintiff any good to do so. In this court defendant's counsel argue that there could be no amendment of the notice of injury and no recovery under it as it stood. In granting the nonsuit the court stated that the evidence conclusively showed that there was no defect in the walk.

The cause of the injury as stated in the notice was the slippery condition of the walk due to the slant at which the boards were laid and the fact that they were old and worn. The complaint practically follows the notice in describing the de-

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fect. Neither the notice nor the complaint set forth that there was any hole in the incline or that the boards were rotten. On the trial the plaintiff offered evidence to prove an entirely different cause of action from that attempted to be set forth in the complaint. She testified that there was a hole in the incline which was covered with leaves and that she stepped into it and was injured in this way. It is conceded in this court by plaintiff's counsel that the incline was not sufficiently steep to constitute a defect on account of which recovery could be had. It is not conceded that the complaint does not cover the defect now complained of, although it well might be.

It is rather strange that, if plaintiff stepped in a hole and had the difficulty in extracting her foot from it that she testified to on the trial, no mention was made of it to her counsel when the notice was prepared or when the complaint was drawn which was verified by her. It should in justice to her be said that she did not understand or speak the English language very well, and whether the significant omission from the complaint and notice was the result of plaintiff and her counsel not being able to understand each other, or whether she amended her facts to suit the exigencies of the case, was and is for a jury to say.

There is no doubt that under the law as it existed prior to the passage of ch. 85, Laws of 1893, the notice was incurably and hopelessly bad. That amendment, among other things, provided that a failure to correctly describe the defect which caused the injury should not defeat a right of action where there was no intention to mislead the municipality and it was not in fact misled. Defendant's counsel call attention to the cases of *Benson v. Madison,* 101 Wis. 312, 77 N. W. 161, and *Gagan v. Janesville,* 106 Wis. 662, 82 N. W. 558 (both of which arose after the amendment was enacted), as holding that this statute made no substantial change in the law as it existed. The counsel representing the plaintiffs in these

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cases evidently did not discover the amendment, and if opposing counsel were better informed they maintained a discreet silence and the cases were disposed of without reference to the amendment and manifestly without knowledge of it. It was incorporated in the revision of 1898 as part of sec. 1339, and since that time and before it has been enforced in accordance with its tenor and effect. *Collins v. Janesville,* 107 Wis. 436, 83 N. W. 695; *Hoffman v. North Milwaukee,* 118 Wis. 278, 95 N. W. 274; *Redepenning v. Rock,* 136 Wis. 372, 117 N. W. 805. The statute is a plain and reasonable one, and, being plain, it should be given full effect in any event inasmuch as it is valid.

We think on the record as it stood in the circuit court it could not be said as a matter of law that the plaintiff intended to mislead the defendant or that the defendant was misled. What the evidence may disclose after a full trial is another matter. The sidewalk inspector examined this walk shortly after the accident, and the jury might have found on the evidence then before it that the defendant was seasonably advised of the existence of the hole and was not misled. It might also find that there was no intention to mislead, because the plaintiff testified in substance that it was due to her lack of familiarity with the English language that she did not make her attorneys understand that she stepped into a hole in the incline. Wherever conflicting inferences may be drawn from the evidence the question is one for the jury. *Hoffman v. North Milwaukee, supra.* So we conclude that the defect in the notice did not warrant the court in taking the case from the jury.

Two photographs of the walk taken by the plaintiff, and one taken by the defendant, were offered in evidence. Two of them were side views and one a front view or nearly so. The court in granting the nonsuit stated that the front-view photograph taken and offered by plaintiff conclusively showed that there was no hole in the sidewalk, and that if fifty wit-

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nesses should testify to the contrary the photograph would conclusively show that they were mistaken, and that a verdict in plaintiff's favor could not be permitted to stand. All three of the photographs tend to show that such a substantial defect did not exist in the walk as plaintiff claims. They do show that there was a narrow piece out of the side of one of the boards near the bottom of the incline, and plaintiff identified this as the hole in which she stepped. An inspection of the photographs would lead to the conclusion that the space was altogether too narrow to admit a human foot. But we do not think that the photographs should be accepted as infallible. There is apparently a good deal of jugglery practiced in photography. Certain objects may be made prominent or minimized to suit the wishes of the photographer. Of course the plaintiff had this particular photograph taken and offered it in evidence and vouches for its accuracy, and it is in testimony that it is accurate. But we are not satisfied that it conclusively appears that the camera might not have been so placed that a space large enough to admit a foot might appear to be very much narrower on the picture. Plaintiff testified that her foot went through this hole and another witness testified that he examined the walk a few minutes after the accident and that the hole was there and was large enough to admit the plaintiff's foot. We confess that the probabilities are very strong that if plaintiff's foot went through the aperture shown on these photographs it must have been of the Cinderella order. The trial court has had some obvious advantages over this court in passing on a question of this kind, but we are of the opinion that it would be rather unsafe to tie to a photograph as strongly as the circuit judge did, in the absence of any evidence as to the width of the shoe worn or any evidence from experts in photography as to whether the width of the opening could be definitely determined from the photograph. When plaintiff rested, it might not be inapt to say that her case was in an anemic condition.

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However, in the absence of any other proof, it should have gone to the jury. The jury on the evidence produced, when properly enlightened by the eloquence of counsel, might give a substantial return to the plaintiff for the injury she complains of, and the judgment appealed from must be reversed.

By the Court.—Judgment reversed, and a new trial ordered.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant, vs. MENASHA WOODEN WARE COMPANY, Respondent.

November 19—December 8, 1914.

Railroads: Regulation of rates by state: Revocation of power granted to companies: Statute construed: Prior special contracts superseded: Constitutional law: Impairing obligation of contracts.

1. Under the Railroad Commission Law (ch. 362, Laws of 1905; secs. 1797—1 to 1797—36, Stats.) railroad rates within the state must be reasonable, just, and nondiscriminating, and apply to all shippers alike within the territory and for the commodity covered by the tariff rates.
2. The power to regulate the compensation to be paid for their services, granted to railroad companies by sub. 9, sec. 1828, Stats. 1898, was subject to the right of the state to amend or annul it; and all contracts made pursuant thereto by railroad companies were subject to be superseded whenever the state should resume the exercise of its sovereign power to regulate rates.
3. When, therefore, pursuant to the Railroad Commission Law, a railway company filed its tariffs covering rates for the transportation of freight as to which a special contract then existed, such contract became inoperative.
4. In so far as there is language in the opinion in *Superior v. Douglas Co. T. Co.* 141 Wis. 363, to the effect that a contract for a public utility rate made prior to the passage of the Public Utility Law would be saved by the constitutional prohibition against laws impairing the obligation of contracts, irrespective of sec. 1797*m*—91, Stats., it is disapproved.
5. That part of sec. 1797—6, Stats., providing that nothing in the Railroad Commission Act shall be construed to prevent "transit

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and other special contract rates," refers to rates to be made thereafter under the supervision and regulation of the commission and complying with the requirements of that section, and does not relate to special contracts existing at the time the law took effect.

MARSHALL, J., dissents.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Action to recover the tariff freight charges on carload shipments of logs and wood bolts from various points in the state to Ladysmith carried over plaintiff's road between June 1, 1911, and March 1, 1912. So far as affecting any question decided upon the appeal the facts are these: On December 15, 1899, the parties entered into a contract in the form of an offer and acceptance which read:

"That in consideration of your making us a rate of 3c per hundred pounds, minimum of 30,000 pounds on staves and heading from Warner to Prentice and $3 per car on logs and bolts from McCord to Warner and the same rate west of Warner as far as McCord is east of Warner on logs and bolts, with the understanding that the freight on lumber to general markets from Warner will not average any higher than that from Chippewa Falls and that any of our pine timber that we have between Gagen and Rhinelander, you will be willing to haul to either Prentice or Pembine at $1 per thousand. Minimum on logs 5,000 feet per car and on bolts twelve cords per car.

"We propose to put in a mill as soon as it can be done in the spring at Warner. This, of course, is with the understanding that you will put in the necessary sidings for our mill at Warner and sidings where we desire to make shipments of logs and bolts where shipments would warrant, the understanding being that we furnish the right of way, grading and ties.

"The above rates are to hold good as long as we own and operate the mill at Warner."

Warner is now called Ladysmith and McCord is about sixty miles east of Ladysmith. The rate named in the contract was observed by the parties until June 1, 1911, except that

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from 1907 defendant paid $4 per car, because of the increased size of cars in common use. This modification was consented to by both parties as a proper construction of the contract. February 27, 1911, the plaintiff sent notice to defendant that tariffs covering the shipments in question would be filed with the Wisconsin railroad commission and freight charged pursuant to the tariffs and not under the contract. Subsequently tariffs were filed with the Wisconsin railroad commission covering the period between June 1, 1911, and March 1, 1912. These tariffs placed all Wisconsin shippers on the same basis, and exceeded the contract price, but provided for only a reasonable rate.

Plaintiff claims the contract was superseded by the Wisconsin Railroad Commission Law and by the tariffs filed pursuant thereto. The defendant claims the contract is still in force and controls the price that it should pay. The circuit court held that the contract was still in force and governed the freight rate, and it entered a judgment in favor of plaintiff for the freight due under the contract, to wit, $113.09, instead of for the sum of $3,217.04, due under the tariffs, and enjoined plaintiff from refusing to haul under the contract rate. From such judgment the plaintiff appealed.

For the appellant there was a brief by *Silas Bullard, W. A. Hayes,* and *Kenneth Taylor,* attorneys, and *Alfred H. Bright,* of counsel, and oral argument by *Mr. Taylor* and *Mr. Bright.*

For the respondent there was a brief by *Thompson, Thompson & Jackson,* and oral argument by *J. C. Thompson.*

Vinje, J. That it was the avowed purpose of ch. 362, Laws of 1905 (secs. 1797—1 to 1797—36, Stats.), and the acts amendatory thereof, known as the Wisconsin Railroad Commission Act, to secure nondiscriminating, just, and reasonable rates for all services rendered by railroads as common carriers of persons and property within the state is so plain

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from the language of the act as not to admit of serious doubt. Sec. 1797—3 provides:

"Every railroad is hereby required to furnish reasonably adequate service and facilities, and the charges made for any service rendered or to be rendered in the transportation of passengers or property or for any service in connection therewith, or for the receiving, switching, delivering, storing or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Sec. 1797—23 declares any undue or unreasonable preference or advantage or disadvantage to any person, firm, or corporation unlawful and prohibits the same; and sec. 1797—24 penalizes rebates, concessions, or discriminations in respect to the transportation of any property within the state. Treble damages are provided for in behalf of the person, firm, or corporation injured thereby in addition to the penalty accruing to the state. Sec. 1797—25. These provisions taken in connection with the whole scheme of the act unmistakably point to the conclusion that railroad rates within the state should, after the act took effect, be reasonable, nondiscriminating, and apply to all shippers alike within the territory and for the commodity covered by the tariff rates.

The question therefore arises whether or not the contract between the parties was superseded by the Railroad Commission Act and the filing of tariffs affecting the freight in question in accordance with the provisions of such act. The defendant claims that its contract was in no wise affected by the enactment of the act and the filing by plaintiff of tariffs thereunder, because the contract, being valid when made, could not by reason of the provisions of the federal and state constitutions prohibiting the passage of any law impairing the obligations of contracts be invalidated by any legislative act. And it relies especially upon the case of *Superior v. Douglas Co. T. Co.* 141 Wis. 363, 122 N. W. 1023, as being decisive

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of the correctness of the position taken. It further claims that in any event sec. 1797—6 saves the contract, because that section in its terms saves transit and special contract rates.

Does the Railroad Commission Act, irrespective of sec. 1797—6, and the filing of tariffs thereunder covering the transportation provided for in the contract supersede it? That it would be superseded except for the constitutional provisions above referred to is quite plain. The act provided that the lowest schedule of rates in force in April, 1905, should constitute the lawful schedule of rates until changed by the filing of other tariffs. Sec. 1797—35. Sec. 1797—4 makes it the duty of every railroad to file with the commission a full schedule of rates in force for all services rendered by it within the state. And sub. (c) thereof declared:

"It shall be unlawful for any railroad to charge, demand, collect or receive a greater or less compensation for the transportation of passengers or property or for any service in connection therewith than is specified in such printed schedules, including schedules of joint rates, as may at the time be in force, and the rates, fares and charges named therein shall be the lawful rates, fares and charges until the same are changed as herein provided."

So it is plain as stated in *Frank A. Graham Ice Co. v. C., M. & St. P. R. Co.* 153 Wis. 145, 140 N. W. 1097, that the legislature intended to and did provide for an exclusive method of fixing freight rates, in so far as it could constitutionally do so.

The contract relied upon by the defendant was entered into pursuant to the provisions of sub. 9 of sec. 1828, Stats. 1898, which gave the railroad company the right to regulate the compensation to be paid for transporting passengers and property, and it is conceded by plaintiff that it was valid when made. The corporate power thus granted to the plaintiff to regulate the compensation to be paid for its services was granted subject to the right of the state to amend or annul it.

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There was no absolute irrevocable grant of power to the railroad company to forever regulate rates, but only a grant of power to be exercised by it until modified, amended, or resumed by the state. The power to regulate the rates of common carriers is a sovereign power of the state. *Milwaukee E. R. & L. Co. v. Railroad Comm.* 153 Wis. 592, 142 N. W. 491. And every contract made as to such rates with a corporation authorized to contract in reference thereto is made with the knowledge of and subject to the right of the state at any time to resume the exercise of such sovereign power. The legislative right to supersede it is as clear as though it were written into the contract itself, for the law implies it. This was expressly held in *Milwaukee E. R. & L. Co. v. Railroad Comm., supra,* and as there stated was involved in the decision in *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925, only in the latter case it was held the state had not exercised its power to act. To construe sub. 9 of sec. 1828, Stats. 1898, as authorizing railroad companies to make contracts for rates binding upon the state when it resumes its rate-making power would be to hold that the legislature could part with an attribute of sovereignty. This it cannot do. In a democracy there can be no abdication. Sovereignty is not subject to a perpetual gift, grant, or barter. A perpetual grant *under* sovereign power may be made, but not a perpetual grant *of* sovereign power. The railroad company was but an agency of the state in regulating rates, and as such it had no authority to enter into a contract not subject to modification or revocation by the state. *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925; *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530; *Kenosha v. Kenosha H. T. Co.* 149 Wis. 338, 135 N. W. 848. Federal authorities are to the same effect. It has been uniformly held by the supreme court of the United States that contracts between private parties and common carriers fixing compensation to be paid for transportation, though made under state or federal

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authority, are made subject to the right of the state or of Congress to modify or annul them under their sovereign power to regulate rates. *Georgia R. & B. Co. v. Smith,* 128 U. S. 174, 9 Sup. Ct. 47; *Armour P. Co. v. U. S.* 209 U. S. 56, 28 Sup. Ct. 428; *Louisville & N. R. Co. v. Mottley,* 219 U. S. 467, 31 Sup. Ct. 265; *Portland R., L. & P. Co. v. Railroad Comm.* 229 U. S. 397, 33 Sup. Ct. 820. To the same effect is *Seaman v. M. & R. R. R. Co.* (Minn.) 149 N. W. 134, a case almost identical with the one at bar.

As pointed out in *Kenosha v. Kenosha H. T. Co.* 149 Wis. 338, 135 N. W. 848, the contract in the case of *Superior v. Douglas Co. T. Co.* 141 Wis. 363, 122 N. W. 1023, was in fact saved by the provisions of sec. 1797*m*—91 exempting existing contracts from the provisions of the Public Utility Act as to discrimination, whether or not the opinion in the case based it upon that ground. In so far as there is language in that opinion to the effect that a contract for a public utility rate made prior to the passage of the Public Utility Law would be saved by the constitutional prohibition against laws impairing the obligations of contracts, irrespective of the exempting part of the law referred to, it is disapproved.

When the plaintiff filed its tariffs covering the freight rates for the transportation of the freight included in the contract, the latter became inoperative. The state had then, through the instrumentality and by the method by it prescribed, fixed another rate which became the only lawful rate till changed as provided for in the act. There was no change made in the tariffs filed during the period the freight in question was transported.

Sec. 1797—6 provides:

"Nothing in sections 1797—1 to 1797—38, inclusive, shall be construed to prevent concentration, commodity, transit and other special contract rates, but all such rates shall be open to all shippers for a like kind of traffic under similar circumstances and conditions, and shall be subject to the provisions

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of sections 1797—1 to 1797—38, inclusive, as to the printing and filing of the same. Provided, all such rates shall be under the supervision and regulation of the commission."

The claim that this contract is saved under the clause "transit and other special contract rates" is not well taken. The section quoted refers to rates made in the future under the supervision and regulation of the commission and complying with the requirements of the section. It does not relate to special contracts existing at the time the law took effect. The very purpose of the act was to abolish all existing private, secret, and special contracts and traffic arrangements and to place all shippers in future upon an equality so far as practicable. The abuses under the old system consisted chiefly in favored shippers and favored localities, resulting in discriminations and inequalities enabling the favored shippers to crush competition and the favored localities to thrive at the expense of those less favored. These were some of the more important abuses the act sought to abolish. Its effect would in a large measure be rendered nugatory had existing contracts and tariff agreements been preserved. In order to strike at the root of the evil it was necessary for the state to resume full control of its rate-regulating power and to start with a clean slate. This it did by providing that in future all railroad transportation rates within the state should be under the supervision and control of the commission, subject to the provisions of law relative thereto. As to the invalidity generally of contracts inconsistent with published tariffs, see 4 Ruling Case Law, 603 *et seq.* and cases cited.

The circuit court should have entered judgment for the amount of the tariff rate, viz. $3,217.04, less any payments made thereon, with interest on such sum from March 16, 1912, the time of the commencement of the action.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment as indicated in the opinion.

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The following opinion was filed January 8, 1915:

MARSHALL, J. (*dissenting*). For reasons I stated in *Milwaukee E. R. & L. Co. v. Railroad Comm.* 153 Wis. 592, 630, 142 N. W. 491, I cannot agree to the decision here. Such decision, naturally, though not necessarily, follows from the logic of the former case, the infirmity of which I sought to point out and which was likewise exhibited, as I think, in the opinion of Mr. Justice TIMLIN, though by a line of reasoning of his own he was able to concur in the result. I shall continue to dissent from the majority view before, until it shall have been passed upon by the federal supreme court, which I firmly believe will result in its being condemned.

There is no more important feature of our constitutional system than the one prohibiting legislation impairing the obligations of contracts. This court has vindicated such feature over and over again. It extends to corporations as well as individuals. There is no difference, as has often been held and is clearly pointed out by abundance of authority in the opinion of Mr. Justice TIMLIN referred to, as well as in my own.

True, there is the reserved power to alter or amend corporate charters, though contractual in nature, but that does not extend further than the corporate grant which is conditioned upon such power. It does not justify supersession of existing business contracts, legitimately made upon consideration parted with. It does not justify confiscation of property, tangible or intangible. It does not extend to and authorize impairment of any ordinary business contract,—any not inhering in and essentially a part of the corporate privilege, as this court has heretofore held. Those contracts are just as sacred,—just as clearly within fundamental protection,—as contracts between individuals. The one involved in this case is, to my mind, clearly of that nature and, as I

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before understood the view of the court, and understand it now, this far it coincides with my own. But a new idea was advanced in the former case, and rules now as seems to me,—one which supersedes and throws into discard all heretofore said in this and other courts since the decision in *Dartmouth College v. Woodward,* 4 Wheat. 518.

The novel idea, as I understand it, is that there is an inherent power,—one above the constitution, so to speak, or, at least, not limited by it, state or national, to deal at pleasure with corporate contracts though made under the usual power to do what an individual might lawfully do in conducting the same or similar business. It will be discovered that my brother TIMLIN industriously sought, and to his satisfaction found, a pathway, consistent with the logic of the *Dartmouth College Case,* to reach the conclusion pronounced before, as a condition of concurring with it.

Had the instrumentalities so positively asserted before and applied now, been efficiently thought of in *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, it would not have been deemed necessary, or even feasible, to reach the conclusion which so logically, as was thought, could only be seen through the vista of reserved power to alter or amend corporate charters.

I think I do not misunderstand the effect of the former decision. It is to the effect that the state possesses the sovereign power to fix the compensation which a public utility corporation may demand for service, superseding existing contracts containing all essential elements of mutuality as to promises; and even characterized by a paid consideration upon one side to be compensated for *in futuro;* that the exercise of such power does not need the aid, nor fall within the purview, of the fundamental reserved power to alter or amend corporate charters. No authority is cited to support that doctrine. It seems to rest on the idea that changed conditions may give rise to legitimate judicial modification or change of

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the unwritten law, and call for assertion of a principle by which the prohibition against impairing the obligation of contracts may be rendered dominant.

I have thought best to express myself here in general terms, without citation of authority. Reference to my opinion and that of Mr. Justice TIMLIN in the former case will furnish ample in the matter of illustration.

There is no point where there has been greater effort to securely intrench rights than that relating to contracts. We see that in the Northwest Ordinance which preceded the national constitution, and again in the latter, in the form of a prohibition upon the power of the states, and again in our state constitution, in the form of a limitation of legislative power.

It is also within the broad guaranty upon which our whole constitutional fabric was constructed. There is no exception other than under the reserved power. Whatever measure of inherent power to interfere, destructively, with the obligations of contracts, is possessed by the lawmaking power, as an original matter, is limited by the fundamental law the same as the police power, which at one time was thought to be above constitutional restraint.

This case furnishes a striking illustration of the harmful effect of the new doctrine. The respondent, in effect, bought and paid for the privilege it claims. The interference is not with the power to make contracts, nor power to execute existing contracts which have been fully satisfied up to date, so that nullifying them cannot work hardship by taking away, without consideration, a valuable purchased right; but with a property right acquired, contractually, for a consideration parted with,—a right which is as essentially property as any tangible thing respecting invested capital. Such property is confiscated in fact. That is the real effect of the doctrine upon which the decision in this case is grounded.

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HUTCHINSON, Respondent, vs. CITY OF OSHKOSH, Appellant.

November 19—December 8, 1914.

Municipal corporations: Injury from defect in sidewalk: Effect of itemizing claim: Elements of damage: Mental suffering: Loss of business: Excessive damages: Married women.

1. **Whether the itemizing of damages in a claim filed against a city for a personal injury, and in the complaint filed in the circuit court on appeal, has the effect to limit the amount recoverable for any one element of damage to the sum specified therefor in the itemized claim, not decided.**
2. **Even if the itemizing of the claim has such effect, the element of mental suffering or chagrin on account of a deformity resulting from the injury is not included in a specified item of damages by reason of inability to carry on plaintiff's business; and for such element a substantial sum may in a proper case be allowed.**
3. **For damages by reason of the inability of plaintiff (a married woman forty years old) to carry on her established dressmaking business from which her net earnings had been about $1 per day, because of a permanent injury and impairment of her right leg resulting from a fall on a defective sidewalk, and for the element of mental suffering or chagrin on account of deformity and disfigurement resulting from the injury, an award of $4,000 in this case is *held* not excessive.**
4. **A married woman who carries on a separate business in her own name can recover in her own name damages for any injury to her earning power in that business.**

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an appeal from a judgment recovered against the city of *Oshkosh* on account of injuries received by the plaintiff, a married woman, as the result of a fall upon a defective sidewalk in said city.

It appears by the evidence that in her verified claim filed with the city clerk the plaintiff itemized her damages as follows:

To doctors' bills, past and future, medicines, etc.....	$250 00
To loss of services in following her occupation and attending to business as dressmaker from date of injury to presentation of this claim.....	600 00

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To future loss of services in said business, because of permanent injury	$2,000 00
To pain and suffering, past, present and future, because of injuries sustained	1,000 00
To present and future disfigurement, impairment, and disability of injured limb	2,000 00
	$5,850 00

This claim having been disallowed by the city council, the plaintiff appealed from such disallowance to the circuit court, where a formal complaint was filed in which she also claimed $5,850 damages, made up as follows:

Medical attendance and nursing	$250 00
Past and future loss in her business	2,600 00
Damage resulting from the deformity, disfigurement, shortening, permanent injury, and impairment of her leg	2,000 00
Pain and suffering, past and future	1,000 00
	$5,850 00

The court charged the jury that they were not to allow anything for medical attendance or nursing, but that they should award the plaintiff, if entitled to recover, reasonable compensation for her pain and suffering at the time of the accident and up to the time of the trial; also compensation for the pain and suffering which she is reasonably certain to suffer in the future; also compensation for her loss of time and earnings resulting from the injury in the dressmaking business in the past and which she is reasonably certain to suffer therefrom in the future. The court further charged that no definite rule could be given for the measurement of damages, but they should be such as would reasonably compensate the plaintiff for the physical and mental pain endured in consequence of the injury.

The jury returned a verdict for the plaintiff and assessed her damages at the gross sum of $5,000.

R. A. Hollister, for the appellant.

For the respondent there was a brief by *John W. Hume* and *John F. Kluwin,* and oral argument by *Mr. Kluwin.*

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WINSLOW, C. J. The only contention made by the appellant is that the damages allowed are excessive. The argument is that by itemizing her claims for damages in her claim filed with the city clerk and in her complaint the plaintiff has limited herself to the amounts so claimed, *i. e.* that she can recover no more than $1,000 for pain and suffering, and consequently that, if the verdict be sustained, she in fact recovers $4,000 for damages resulting from inability to carry on her business, which sum is said to be grossly excessive.

Conceding, without deciding, that the appellant's contention as to the effect of the itemizing of the claim is sound, we are not able to agree with the conclusion that the damages must be held excessive. It appears with sufficient certainty from the evidence that the plaintiff, though married, had carried on for some years a dressmaking business of her own in a shop separate from her home, from which she realized net earnings of about a dollar a day through the year, and that since the injury she has not been able to carry on the business; that her injury was a severe wrench of the right foot and ankle, which after months of treatment resulted in a permanent fixation of the ankle joint and of the large tendon on the back of the leg, accompanied by a permanent bending back of the toes, making it impossible for her to operate a sewing machine with that foot, as well as impossible to wear an ordinary shoe or to walk normally. The evidence that this is a permanent condition without probability or even possibility of material improvement is ample.

Now if it be granted that the jury could only allow $1,000 for physical pain and suffering, past and present, and hence that it must be considered that $4,000 was allowed for the other items of damage claimed in the complaint, we still do not think this sum must be condemned as excessive. These items were, $2,600 for damages by reason of the inability to carry on her business, and $2,000 for the deformity, disfigure-

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ment, permanent injury, and impairment of the limb. So far as "permanent injury and impairment" included in this latter item is concerned, that element is probably legally included in the item of damages by reason of inability to carry on her business, but the element of mental suffering or chagrin on account of her deformity (and this is what we understand the item to cover) is certainly not so included, and this constitutes a well known element of damage in such cases. *Heddles v. C. & N. W. R. Co.* 77 Wis. 228, 46 N. W. 115; *Nichols v. Brabazon,* 94 Wis. 549, 69 N. W. 342.

In order to sustain the verdict it must be assumed that the jury considered, as they properly might, this element of damage and allowed a substantial sum therefor. This would reduce to that extent the amount allowed for the element of loss of earnings, past and future, by reason of her inability to conduct her separate business. In this view of the case we find it quite impossible to say that the damages were excessive. Her business was established and fairly lucrative. She was only a little over forty years of age. That business might be reasonably expected to continue to bring her returns for many years. It was her own separate business and the profits are secured to her by statute, as well as the right to recover in her own name damages for any injury to her earning power in the business. Secs. 2343, 2345, Stats. 1913.

By the Court.—Judgment affirmed.

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BENNETT, Respondent, vs. BEAVERS RESERVE FUND FRATERNITY, Appellant.

November 20—December 8, 1914.

Life insurance: Assessment policy: Suicide: Forfeiture: Waiver: Estoppel: Acceptance of assessment after death.

1. Where an assessment was fully earned and was due, so that there was an absolute liability for its payment, before the death of a person insured under an assessment policy, acceptance of such assessment after his death did not waive a forfeiture occurring after the assessment became due, nor estop the insurer to insist upon such forfeiture.
2. Thus, where an assessment was fully earned and became due so that the liability to pay it was absolute on the first day of the month, although payment might be made without penalty at any time before the end of the month, and thereafter, during the month, the insured took his own life, subsequent acceptance of such assessment by the insurer with full knowledge of the cause of death did not operate as a waiver or an estoppel with respect to a forfeiture resulting from such suicide.

APPEAL from an order of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Action to recover on a policy of life insurance issued on the assessment plan. The policy contained this language:

"If said member shall, within five years from the date of this benefit certificate, voluntarily or involuntarily, take his own life, whether at the time sane or insane, or shall within five years from the date of this benefit certificate die from the effects of an attempt to take his own life, then, and in either such event, this benefit certificate shall become null and void and of no effect."

The constitution and by-laws were included in the policy and provided, in reference to execution by the board of directors of the power to make assessments, that in levying an assessment the board should state the month for which the same was levied, and it should become due on the first day of such month and be paid on or before the last day thereof. About

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March 3, 1911, an assessment was duly levied, stating that it was for the month of April, 1911. General notice thereof to all policy-holders was duly given, which stated this:

"You will, therefore, each take notice that you are required to pay such assessment according to the terms of your benefit certificate and the by-laws of the Fraternity to the secretary of your colony before the first day of May, A. D. 1911. Any beneficial member not so paying said assessment will stand suspended, and during the period of such suspension the certificate of such member will be null and void."

After the date at which the assessment became due according to the by-laws, but before expiration of the time limited by the notice for payment to avoid the penalty of suspension, the assured committed suicide. During such time but after the suicide, *Mrs. Bennett* paid the assessment to the defendant and it retained the same with full knowledge of the cause of death.

For the appellant there were briefs by *Clancey & Loverud,* and oral argument by *J. M. Clancey.* They cited, among other cases, *Fulton v. Stevens,* 99 Wis. 307, 74 N. W. 803; *Joliffe v. Madison Mut. Ins. Co.* 39 Wis. 111, 118; *Hill v. Farmers' Mut. F. Ins. Co.* 129 Mich. 141, 88 N. W. 392; *Calkins v. Angell,* 123 Mich. 77, 81 N. W. 977; *Provident Mut. R. Asso. v. Pelissier,* 69 N. H. 606, 45 Atl. 562; *Mandego v. Centennial Mut. L. Asso.* 64 Iowa, 134, 17 N. W. 656, 19 N. W. 877; 29 Cyc. 99; 21 Am. & Eng. Ency. of Law (2d ed.) 288.

S. H. Taylor, for the respondent.

Marshall, J. This case must turn on the question of whether there was an absolute liability for the assessment which had not been paid at the time of the suicide.

Confusion with resulting injustice in cases of this sort will occur from want of appreciation of the distinction between acceptance by the insurer of money from the assured to con-

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tinue the policy which he might decline to pay at his pleasure and suffer only the penalty of forfeiture, and acceptance or collection of money from the assured on account of an absolute liability created and persistent until discharged, regardless of any forfeiture after such liability became fixed. In the former situation acceptance of the money would be inconsistent with insisting upon the forfeiture, in the latter it would not.

All cases of waiver and estoppel in favor of continued liability under a policy of insurance, are grounded upon the insurer doing some act inconsistent with insisting upon a termination of the policy. Such unequivocal inconsistent act may be characterized by elements of estoppel, as by putting the policy-holder or claimant thereunder to some expense, as in *Cannon v. Home Ins. Co.* 53 Wis. 585, 11 N. W. 11; *Oshkosh G. L. Co. v. Germania F. Ins. Co.* 71 Wis. 454, 37 N. W. 819; *Dick v. Equitable F. & M. Ins. Co.* 92 Wis. 46, 65 N. W. 742, or by merely the element of waiver as in *Palmer v. St. Paul F. & M. Ins. Co.* 44 Wis. 201, and similar cases. When there is no treatment of the insurance contract as having one status and then a change of position to the prejudice of the policy-holder or claimant thereunder by treating the contract as having a different status, the doctrine of waiver or estoppel, so often applied in actions of this sort, has no application whatever to defeat the effect of a forfeiture.

The foregoing was very clearly illustrated in *Joliffe v. Madison Mut. Ins. Co.* 39 Wis. 111, where it was held that receipt and acceptance after the breach of a condition, working a forfeiture, of money which is due and collectible absolutely, without regard to any forfeiture, is not a waiver of such forfeiture. A distinction was there drawn between a case of receipt and payment upon a policy after the happening of a loss, covering a period within which the loss accrued, and receipt of a payment after loss to discharge a liability which

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existed irrespective of continuance of the policy. The court observed as to the latter situation:

"It may be here observed, that the acceptance by the defendant of such premium after the loss, and even after the defendant had notice of the loss, is of no importance. Such assessment was due and payable absolutely, whether the policy was forfeited or not. . . . The defendant waived nothing by accepting that which, in any event, was its due."

The court decided that in any case acceptance on an assessment policy after a loss shall have accrued of a payment wholly earned before the loss, does not waive a forfeiture happening after creation of the absolute liability. Why the matter in question does not fall within the above stated principle is not perceived. The logic of such contracts of insurance is that each assessment is for a specific period and is fully earned when the period shall have expired. Upon such assessments the assurer depends for the fund to pay its liabilities and, in the main, liabilities existing at the time of the assessment. They are recoverable in the main solely for the benefit of the owners of existing claims. For that reason, as a rule, a considerable length of time is provided to enable the assured, after receiving due proof of loss, to accumulate under the assessment plan money to discharge it. That feature is present in the contract in question. There was a reserve fund and it was provided that ten per cent. of all assessments should be covered into such fund; but that was, evidently, in the main, to provide against deficiencies on account of unpaid assessments. The whole scheme embodied in the contract contemplated liability for carrying the risk for the time mentioned in the assessment. Therefore, obviously, a forfeiture occurring subsequent to such time could not logically affect such liability. Nor could acceptance of payment in discharge of such liability after forfeiture be considered as an act inconsistent with insisting upon it. None of the cases cited by respondent's counsel on the subject of waiver and estoppel apply to the situation here.

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It is evident that the whole case between the parties is before the court so that to plead over would only prolong the litigation. Therefore, it seems best to terminate it by a reversal and a remand for dismissal with costs.

By the Court.—So ordered.

CURKEET, Appellant, vs. JOINT SCHOOL DISTRICT NO. 2, TOWN OF RICHLAND AND CITY OF RICHLAND CENTER, Respondent.

November 20—December 8, 1914.

Schools and school districts: Powers of school boards: Discharge of teachers: Instructions to jury.

1. Under sec. 441, Stats., a school board may discharge a teacher who has failed to perform his duties under his contract.
2. In an action by a teacher against a school district to recover damages for a wrongful discharge, the court instructed the jury: "As a general rule a teacher may be removed or dismissed before the expiration of his term of service for any cause that renders him unfit to be a teacher in the public schools so that the best interests of the school require that he should be removed or dismissed, as for incompetency in teaching, failing to manage and control the school, or failing in any respect to perform his obligations as a teacher, from which arises disorganization in the school work. You are to determine in this case whether the discharge of the plaintiff by the school board was justified." *Held*, that the instruction was not open to the objection that it left it to the jury to say what constituted good cause for discharging plaintiff, nor the objection that under it the jury might assume that the school board was justified in dismissing plaintiff for any reason it considered sufficient, regardless of the evidence. It must be presumed that the jury proceeded under the rules of law given them and the facts in evidence.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Action by the plaintiff to recover damages from the defendant for breach of a contract in discharging him from his

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employment as a school teacher. The plaintiff was an assistant in the defendant's high school during the years 1910–11 and 1911–12 and was re-engaged to teach in the high school beginning the school year 1912–13. He taught from the opening of school, September 12, 1912, and continued in the service until March 8, 1913, when he was dismissed from service by the school board.

There was evidence tending to show that the plaintiff at one time refused to continue instructing a class in mechanical drawing which recited at 8 o'clock in the morning. The principal of the school, however, insisted on his continuance as instructor of this class. Upon report of the matter to the school board and an investigation thereof by its committee, plaintiff was told to comply with the direction of the principal of the school in this and other matters pertaining to the management of the school and the assignment of classes and their hours of recitation. The plaintiff, it appears, reluctantly conformed to this determination of the board and continued to teach this class for the remainder of the school term. It also appears that plaintiff, as director of the football team, arbitrarily tried to revoke a permission he had given to the team to play a game with another high school and represented that he had not consented thereto, but upon a hearing before the principal he admitted in a qualified manner that his consent had been given. It also appears that serious altercations arose between the plaintiff and the lady teachers concerning their management of the main room during specified hours and the management and charge of the girls' basketball team. The troubles finally culminated in plaintiff's refusal to be interviewed or to offer any explanation to the principal of a physical encounter between him and one Olson, a pupil, who was a member of the basketball team, which caused a serious disturbance in the management of the school. Upon report by the principal of these conditions to the school board, the

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plaintiff and Olson were notified to appear before the board and give an explanation of their conduct on March 7, 1913. Olson gave his version of the meeting and the plaintiff was then requested to give any further explanation of the affair. The plaintiff admitted that Olson had stated about what had occurred on that occasion. The evidence also shows that the plaintiff refused to abide by and follow suggestions and directions of the principal of the school.

The court submitted the case to the jury, who returned a general verdict for the plaintiff and assessed his damages at $25. The school district on October 10, 1913, served an offer to have judgment awarded in plaintiff's favor and against the district for the sum of $25 damages, with interest thereon at the rate of six per cent. from April 1, 1913. Plaintiff did not accept this offer and claimed the right to recover damages in the sum of $250 and his costs of the action. The court awarded plaintiff judgment to recover the sum of $25 with the costs of the action up to the date of the defendant's offer of judgment, and granted defendant its costs in the action which were incurred subsequent to such offer of judgment. The plaintiff appeals from such judgment.

For the appellant there was a brief by *Kopp & Brunckhorst* and *Bancroft & Johns,* and oral argument by *L. A. Brunckhorst.* They cited *State ex rel. Burpee v. Burton,* 45 Wis. 150; sec. 453, Stats. 1913; *Carver v. School Dist.* 113 Mich. 524, 71 N. W. 859; *Coffin v. Board of Education,* 114 Mich. 342, 72 N. W. 156; *Tripp v. School Dist.* 50 Wis. 651, 7 N. W. 840; *Scott v. Joint School Dist.* 51 Wis. 554, 8 N. W. 398; *Green v. Gilbert,* 21 Wis. 395; *Jennings v. Lyons,* 39 Wis. 553; *Winkler v. Racine W. & C. Co.* 99 Wis. 184, 187, 74 N. W. 793; *People ex rel. Peixotto v. Board of Education,* 82 Misc. 684, 144 N. Y. Supp. 87.

For the respondent there was a brief by *Burnham & Black,* and oral argument by *O. D. Black.* They cited 35 Cyc. 1089,

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1090, 1097; *Crawfordsville v. Hays,* 42 Ind. 200, 210; *Robinson v. School Directors,* 96 Ill. App. 604; *Tripp v. School Dist.* 50 Wis. 651, 659, 7 N. W. 840.

SIEBECKER, J. It is contended by the plaintiff that the evidence does not justify the submission of the case to the jury and that the court erred in refusing to direct a verdict in his favor for the $250 as demanded in his complaint. The school board is by statute required to perform the duties incident to conducting the common schools, among them the following:

"The board shall visit the school, examine into its condition, advise with the teacher in regard to the instruction, government and progress of the pupils, and exercise such general supervision as may be necessary to carry out the provisions of this chapter." Sec. 441, Stats. 1913.

This statute has been a part of the school law since 1863. School boards have thereby enjoined upon them very extensive duties in maintaining the common schools and in administering the school affairs. Such duties embrace that of inquiry into the question of the failure of a teacher to perform his contract obligation as a teacher, and if they find that a teacher has breached his contract it is their duty to take such steps as may be necessary to carry out the purposes of the school, and if a teacher has failed to perform his duties under his contract they can discharge him from further service. This duty of the board was recognized in the case of *Tripp v. School Dist.* 50 Wis. 651, 7 N. W. 840. See, also, 35 Cyc. 1089.

An examination of the evidence in this case discloses a situation which justified the court in submitting to the jury the inquiry whether or not plaintiff had breached his contract. In submitting this inquiry to the jury the court instructed the jury as follows:

"As a general rule a teacher may be removed or dismissed before the expiration of his term of service for any cause that

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renders him unfit to be a teacher in the public schools so that the best interests of the school require that he should be removed or dismissed, as for incompetency in teaching, failing to manage and control the school, or failing in any respect to perform his obligations as a teacher, from which arises disorganization in the school work. You are to determine in this case whether the discharge of the plaintiff by the school board was justified."

It is urged that this instruction is erroneous in that it left it to the jury to say what constituted good cause for discharging the plaintiff from his service. We think this claim of the appellant is not sustained. It must be presumed that the jury followed the law as it was given to them by the court in his instructions. They were informed that in law a teacher could be legally dismissed from service if it appears that he is not a fit person to be a teacher, as when it appears that he is incompetent to teach or to manage or to control the school, or otherwise fails to perform his obligations, which disorganizes the school work. It must be presumed that they applied these rules to the evidence before them. We cannot assume, as appellant argues, that the jury under these instructions may have assumed that the board were justified in dismissing the plaintiff for any reason they considered sufficient, regardless of the evidence. It must be considered that they proceeded under the rules of law given them and the facts in evidence. The evidence is sufficient to permit the jury to find that the board were justified in their action resulting in the dismissal of the plaintiff from further service as a teacher. We find no prejudicial error in refusing to instruct the jury as requested in the light of the instruction the court gave the jury in submitting the case to them for determination. The court awarded the proper judgment on the verdict.

By the Court.—Judgment affirmed.

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MORROW, Appellant, vs. TOWNSEND and another, imp., Respondents.

November 20—December 8, 1914.

Specific performance: Contract to convey land: Latent ambiguity: Uncertainty in description: Parol evidence: Mistake: Intention of parties.

1. **The owner of an eighty-acre tract of land platted a part of it as an addition to a village, such addition consisting of four blocks of eight lots each. After nine of the lots had been sold and conveyed by him or by his heirs, the heirs made a contract to sell the eighty-acre tract, "less four village lots, which lots are an addition to the village." In an action to compel specific performance of that contract, it is *held* that the words above quoted created a latent ambiguity and that parol evidence was proper to show the situation of the parties to the contract, the state of the property, and the location of the addition.**
2. **Such evidence, with certain further evidence, is *held* to sustain a finding of the trial court that the parties to the contract intended to exclude therefrom the four blocks, and not merely four lots.**
3. **Specific performance of the contract as written could not be enforced, since it could not be determined which four lots were meant.**

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

This action was brought to compel specific performance of a contract. The contract in question describes the land as follows: "The west half of the northwest quarter of section twenty-eight (28), in town six (6) north, of range four (4) west, less four village lots, which lots are an addition to the village of Mount Hope." The court below granted specific performance of the contract, but construed the description to read: "The west one-half of the northwest one-fourth (¼) of section twenty-eight (28), in town six (6) north, of range four (4) west, in Grant county, Wisconsin, except four village blocks, being all of Humphrey's addition to the village of Mount Hope."

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The court below upon certain proof made held that the statement "four village lots" meant "four village blocks" and rendered judgment for specific performance accordingly, from which judgment plaintiff appeals.

For the appellant there was a brief by *T. L. Cleary,* attorney, and *G. E. Cleary,* of counsel, and oral argument by *George Cleary.*

For the respondent there was a brief signed by *Brown, Brennan & Carthew,* attorneys for respondent *Townsend,* and *Harry E. Carthew,* guardian *ad litem* for George Townsend, and oral argument by *H. E. Carthew.*

KERWIN, J. It is contended by counsel for appellant that the court erred (1) in refusing to find that the intention of the parties to the contract was to exclude from the contract all of block 1 and lot 1 in block 2 of Humphrey's addition to the village of Mount Hope; and (2) in making the finding that it was the intention of the parties, when the contract was signed, to exclude therefrom all of Humphrey's addition to the village of Mount Hope, comprising four blocks.

The main question presented here for our consideration is whether the court below, upon the evidence, was warranted in finding that it was the intention of the parties to the contract to exclude the four blocks and whether the contract was sufficiently definite for enforcement. It is established in the case that Robert G. Humphrey, while the owner of the eighty-acre tract in question, and on May 14, 1877, platted a part of it as Humphrey's addition to the village of Mount Hope and caused the plat to be recorded; that the land so platted consisted of four blocks of eight lots each with the streets surrounding them; that said Humphrey, while the owner and after said plat had been recorded, conveyed lots 1, 4, 5, and 8 in block 1, and lot 1 in block 2, and said lots have been ever since held by the grantees thereof; that thereafter Humphrey died seised of the balance of said lands and the same descended

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to Maggie McWilliams, Mary H. Townsend, Jennie Morrow, and Cora Humphrey, his daughters, subject to the life estate of his widow, Mary J. Humphrey; that on February 4, 1889, the widow and heirs conveyed to Wayne Williams lots 2, 3, and 6 in block 1 in said addition, which lots have since been held by him and his grantees, and on February 5, 1889, the contract under consideration here was made, and at this time all of block 1 and lot 1 of block 2 had been conveyed and were inclosed and occupied by the owners under the conveyances.

The difficulty arises from the use of the word "lots." It seems quite clear that the parties could not have meant to exclude only four lots, because at that time more than four lots had been sold and were owned by other parties. Moreover, the contract on its face excludes the idea that four lots were intended and supports the idea that four blocks were intended. The exception in the contract is "four village lots, which lots are an addition to the village of Mount Hope." The four blocks constituted the addition to the village of Mount Hope, while four lots did not. The addition embraces thirty-two lots. Moreover, there is nothing in the contract or the surrounding circumstances attending the parties at the time of execution of the contract from which an inference could be drawn that four lots were intended, and certainly, even if it could be said that four lots were intended, it would be impossible to determine which four lots were meant, and specific performance, therefore, could not be enforced. *Hannon v. Scanlon,* 158 Wis. 357, 148 N. W. 1082.

The court below found that the intention of the parties when the contract was signed was to exclude therefrom all of Humphrey's addition to the village of Mount Hope, comprising four blocks, and we are inclined to the opinion that this is the only consistent construction which can be given the contract. The case, therefore, turns on whether this finding is supported by competent evidence. The words of the contract, "four village lots, which lots are an addition to the vil-

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lage of Mount Hope," create a latent ambiguity, and parol evidence was therefore proper to show the situation of the parties to the contract, the state of the property, and the location of the addition. *Lego v. Medley,* 79 Wis. 211, 48 N. W. 375; *Messer v. Oestreich,* 52 Wis. 684, 10 N. W. 6.

Very little evidence was offered, and doubtless very little could have been produced in view of the circumstances of the case. But there was evidence that at the time of making the contract an addition consisting of four blocks was located on the eighty acres in question, and there is some evidence which at least tended to show that the four blocks were intended to be reserved, not four lots.

It is plain that no four of the village lots constituted the addition, and it is quite apparent from all the surrounding circumstances existing at the time the contract was made that the scrivener inadvertently used the word "lots" when the intention of the parties to the contract was to except the four blocks; at least we think the court below was justified in so finding. We do not feel warranted in disturbing the finding of the court below, therefore the judgment must be affirmed.

By the Court.—The judgment is affirmed.

GOVIER, Appellant, vs. BRECHLER and another, Respondents.

November 20—December 8, 1914.

Vendor and purchaser of land: Brokers: Knowledge of agent, when not imputed to principal: Evidence: Competency: Maps: Contract construed: "Plow land:" "Close to a railroad:" Reformation of contract.

1. **One who employed an agent to find a purchaser for his land was not chargeable with knowledge which the agent had previously acquired (but did not communicate to his employer) as to other lands which the employer finally agreed to accept in part payment, since such knowledge of the agent did not relate to the sub-**

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ject of his employment, was not acquired while he was acting as agent, and was not within the scope of his authority.

2. A contract for the sale of land having provided that the vendor was to accept other land in part payment, but that if such other land was not as represented he might reject it and demand cash in lieu thereof, knowledge of the vendor's agent that such other land was not as represented was immaterial and did not affect the vendor's right to reject it.
3. Maps and diagrams are frequently received in evidence with very slight proof of accuracy or authenticity when they constitute merely a picture or a summing up of evidence otherwise legitimately in a case; but when they are offered to establish an independent relevant fact—in this case the existence of a railroad right of way near certain land—they must be certified or verified or otherwise made competent under the same rules as apply to other documentary evidence.
4. Where, in a contract of sale, land is represented as being "plow land," that means that it is tillable land, not arid land which might be plowed without any beneficial results.
5. The words "close to a railroad" in a land contract must ordinarily be understood relatively to local conditions. *It seems* that land in North Dakota sixteen miles from a railroad is not within the meaning of the words.
6. A court of equity will not reform a written instrument for a mistake in reducing it to writing unless such mistake is established by the most clear and satisfactory evidence.
7. The evidence in this case is *held* insufficient to warrant the reformation of a contract for the sale of land so that it should provide that the land to be taken by the vendor in part payment was to be "close to a railroad *right of way*," instead of "close to a railroad."

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Meyer & Burgess,* attorneys, and *Richmond, Jackman & Swansen,* of counsel, and oral argument by *K. F. Burgess.*

W. E. Howe, for the respondents.

TIMLIN, J. A written contract in words and figures following existed between the parties:

"This agreement made this 8th day of Sept. 1911, between *James Govier,* party of the first part, and *Fred L. Brechler* and *Peter Boebel* parties of the second part all of Fennimore

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Grant Co. Wis. Witnesseth—That first party hereby agrees to sell to the above named second parties his farm consisting of 260 acres more or less in the town of Mt. Ida, Grant Co., Wis. and described as follows—The NW ¼ of SW ¼ and W ½ of NW ¼ and the West ½ of SE ¼ of NW ¼ all in Section 14, also the NE ¼ of SE ¼ and the East ½ of NE ¼ in Section 15. All the above in Township six north of Range three west of the 4th P. M.—the consideration to be twenty-two thousand, one hundred ($22,100) dollars to be paid as follows—Forty-eight hundred ($4,800) in exchange of property consisting of first party's choice of 160 acres of the E ½ of Section 25, Township 132, Range 95 West of the 5th P. M. in Adams County, No. Dakota, with the understanding that 95 per cent. to be plow land and close to a railroad. Papers to be made Mch. 1st, 1912, also Forty-eight hundred ($4,800) dollars in cash or less Mch. the first 1912, and balance, Five Thousand ($5,000) dollars to be agreed upon Mch. 1, 1912, at 5 per cent. Int. from 3-1-1912. Second parties to fulfil on contract between W. R. Fry and *James Govier,* there now being a balance due on said contract $7,500 on principal, *Govier* to pay the interest on said contract to March 1st, 1912, and the taxes on the 260 acres. First party agrees to pay for drilling the well now under way on the 260 acres—or if not completed to pay second parties the sum of Three hundred ($300) dollars. Second parties to convey by warrantee deed free of all indebtedness, including 1911 taxes on the 160 acres chosen by first party as part payment, with abstract showing good title, also to pay round-trip fare to inspect and select this 160 acres in No. Dak.—and if not as represented first party will not be compelled to accept same as part purchase price of 260 acres.

"In presence of — JAMES GOVIER.
"J. R. Villemonte. — FRED L. BRECHLER.
"Will Mauer. — PETER BOEBEL."

This contract was performed by the parties except as to the North Dakota land, which the plaintiff rejected under that clause of the contract which provides that if this land is not as represented he need not accept the same in part payment for his land. The plaintiff then brought an action at law against defendants to recover this unpaid portion of the purchase money. The defendants interposed an answer and a

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counterclaim and in the latter pleading sought a reformation of this contract so as to make it read: "close to a railroad right of way" instead of "close to a railroad;" and thereupon to require the plaintiff to accept a deed of this North Dakota land in payment of the balance due upon said contract. The circuit court gave defendants the relief demanded in this counterclaim and the plaintiff appeals, contending that there was no sufficient evidence to warrant the exercise of the equitable power of the court to reform a written instrument. Appellant further contends that the court took an erroneous view of the nature of the contract and also decided for reformation upon several erroneous rules of law, by the application of which certain evidence relating to knowledge of a broker or middleman of the plaintiff was given an improper and unwarranted legal value, and further that said ruling rested in part upon incompetent evidence relating to the existence and location of a railroad right of way. Further, that without this erroneous view of the contract and with these two items of evidence out, the circuit court would not have decided the case in this way, and further that in any event the evidence in support of the counterclaim is not so clear and satisfactory as to support a decree for reformation. It must be borne in mind that there is no evidence of fraud. The reformation was decreed on the ground of mutual mistake. The circuit judge at the close of the evidence said:

"Well, that closes the testimony. I haven't any doubt whatever that *Mr. Govier* authorized Mr. Lange to find a purchaser at the price of $80 an acre; and Mr. Lange couldn't find any one that would give $80 an acre cash for this land; and thereupon the matter of a sale was talked over by the defendants in this case with Mr. Lange, and ultimately with Mr. Lange [*Govier*], resulting in this contract. By the contract the Dakota quarter-section was to be put in at $4,800. Now that land at $80 an acre cash would bring $20,800. At $85 an acre, being the price at which it was taken by the defendants in this case, it would bring $22,100. The difference is $1,300 between the price it was put in at and the price at

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which the plaintiff was willing to sell the land for cash. In other words, defendants gave to the plaintiff $1,300 more for the land on this trade than they would have had to do if they paid cash for it at $80 an acre. So that to start out with, this is not one of those cases that appeals very strongly to the court in favor of the plaintiff in this case. He got a very good price for his land, more than he was willing to sell it for apparently."

The plaintiff's action was at law. The contract upon which he sued was on its face a very proper and lawful contract, well and intelligently devised to protect the man who was parting with his property, visible and known to both parties, and who was to receive in part payment a distant tract of land concerning which he has no accurate detailed information. The contract is plain and easily understood. It may well be that the plaintiff, while willing to accept $80 an acre in cash for his land, would not sell for less than $85 an acre if he were obliged to take North Dakota land in part payment, and not then unless the North Dakota land was as represented. Foresight and intelligence in making perfectly plain and lawful contracts are not to be penalized, nor is such a contract to be received by the court in any unwelcome spirit.

The plaintiff in the spring of 1911 employed one Karl Lange to procure a purchaser for his land, and Lange brought defendants to see the land and introduced them to the plaintiff; in short, procured them. At this time Lange had knowledge which he acquired in 1910 of the fact that there was no railroad close to this North Dakota land, but he did not communicate this information to the plaintiff. The circuit court, we are convinced, by rulings and remarks made during the trial, considered that the plaintiff was chargeable with this knowledge of Lange. This was erroneous. Lange had no agency or authority from the plaintiff of any kind at the time he learned this fact. He never had any authority or agency from the plaintiff to accept or pass upon the consideration to be received by plaintiff. His agency was to find

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a purchaser able, ready, and willing to purchase for cash at $80 per acre or otherwise on terms satisfactory to the plaintiff. The plaintiff having never delegated to Lange an agency covering the selection or rejection or acceptance of this North Dakota land, the knowledge which Lange had did not relate to the subject of his agency and was not acquired while he was acting as agent and was not within the scope of the agent's authority, hence this item of evidence was entirely incompetent and irrelevant. *Congar v. C. & N. W. R. Co.* 24 Wis. 157; *Shafer v. Phœnix Ins. Co.* 53 Wis. 361, 10 N. W. 381; *Pringle v. Dunn,* 37 Wis. 449, 468; *Melms v. Pabst B. Co.* 93 Wis. 153, 66 N. W. 518.

There is a second objection to the consideration of this fact of Lange's knowledge, and that is that the parties chose to make a contract giving to plaintiff the right to reject the land and demand cash payment if the land was not as represented in this contract. This had relation to the condition of the land at the time the contract was signed and not at some former time, and it had relation to the particular description of North Dakota land, and there is no rule of law which would prevent the plaintiff removing doubts or suspicions, if he had any, and requiring the defendants to stipulate with reference to the proximity of a railroad to this particular tract at that particular time.

Next, the learned circuit court admitted in evidence, for the purpose of showing there was a railroad right of way within a few miles of this North Dakota land, a certain map with a leadpencil line drawn across it to indicate such right of way. This map was one apparently gotten up by some real-estate agent for advertising purposes. It was not certified by any public officer or verified by any person or otherwise made competent as evidence. Another small map on a larger scale, to which there was annexed an unverified list of tracts of land which the document stated constituted a right

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of way on which the Northern Pacific Railway Company had paid taxes, was also received in evidence for the same purpose. There was no certificate to verify the latter document. Assuming that the fact whether there was or was not a right of way near this land was relevant, the evidence mentioned was incompetent to establish that fact. Maps and diagrams are frequently received in evidence with very slight proof of accuracy or authenticity when they constitute merely a picture or a summing up of evidence otherwise legitimately in the case. But when they are used to establish an independent relevant fact they are subject to the same rules as other documentary evidence.

Next, the learned circuit court during the trial expressed an opinion that the words "plow land," found in the written contract, meant land capable of being plowed. This is manifestly incorrect. Plow land in such connection means tillable land, not arid land which might be plowed without any beneficial results. We think this view affected his construction of the testimony relative to the requirement that the North Dakota land should be ninety-five per cent. plow land.

The words "close to a railroad," found in the contract, might require interpretation under certain circumstances, but here it is tacitly assumed by all parties that reformation was necessary and that land sixteen miles from a railroad was not within the meaning of the contract "close to a railroad." This appears to be a reasonable view of the requirement. But the words ordinarily must be understood relatively to local conditions. Lands in Alaska sixteen miles from a railroad might be considered close to a railroad.

The circuit court found that the quarter-section of land in question contained ninety-five per cent. plow land. The evidence to support this finding is very meager. We can safely say, however, that on a proper view of this contract and excluding the incompetent evidence above mentioned there is

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no sufficient evidence to warrant a reformation of the contract. As long ago as *Harter v. Christoph,* 32 Wis. 245, it was said:

"The rule is perfectly well settled, that a court of equity will not reform a written instrument for a mistake in reducing it to writing, unless such mistake is established by the most clear and satisfactory proof. Until such proof is made the written instrument must be taken to contain the real contract between the parties."

This rule has been re-asserted as late as *Garage E. M. Co. v. Danielson,* 156 Wis. 90, 144 N. W. 284. See, also, *Meiswinkel v. St. Paul F. & M. Ins. Co.* 75 Wis. 147, 43 N. W. 669; *Kent v. Lasley,* 24 Wis. 654. *Boebel,* one of the defendants, was not present when the contract was written out by the scrivener and he signed it without reading it. So that on the practically unsupported testimony of the defendant *Brechler* and contrary to the testimony of the scrivener, the plaintiff, and an employee of the plaintiff, and contrary to the writing, the reformation in question was decreed. We must hold that it was decreed on insufficient evidence.

By the Court.—Judgment reversed, and the cause remanded with directions to enter judgment in favor of the plaintiff for the amount of money due upon the contract in suit, with costs.

RAYBORN, Appellant, vs. GALENA IRON WORKS COMPANY, Respondent.

November 20—December 8, 1914.

Settlement: Written instrument: Signing: Presumption: Master and servant: Injury: Release.

1. Compromise settlements are favored in the law when fairly made.
2. The signing of an instrument raises a strong presumption that its contents are understood, which is not overcome by a mere statement of the signer that he did not understand the nature of the document which he signed.

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3. The jury having in this case, upon sufficient evidence, negatived fraud in the transaction which resulted in the signing of a release by an employee twelve days after he was injured and while he was still in the hospital, the evidence, including his own testimony and that of his physician who was present, is *held* not to sustain a further finding by the jury to the effect that the release was not consciously signed by him.

APPEAL from a judgment of the circuit court for La Fayette county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Action to recover damages for personal injury. Defendant was engaged in wrecking an abandoned mining plant. Plaintiff was directed to remove some boards from the roof of the engine room. This roof was adjacent to the derrick in which the hoister room was built. The hoister-room floor was about eighteen feet from the ground. In proceeding to the engine-room roof plaintiff had occasion to pass over this floor, and when near the outer edge of it one of the boards gave way and he fell and was badly injured. The negligence claimed was failure to furnish a safe place to work and failure to warn the plaintiff of the danger incident to the work which he was directed to do. The answer denied negligence and pleaded settlement and release. Plaintiff was injured June 13, 1913. The jury returned the following special verdict:

"(1) Was the plaintiff at the time he signed the release in question able to understand its nature? *A.* No.

"(2) At the time the release was signed by the plaintiff, was he, in view of all of the existing circumstances, under such false impression as to his rights and the character of the instrument of release and the effect of it as should in justice avoid said release? *A.* No.

"(3) Did the defendant negligently fail to warn the plaintiff that the board in question was loose? *A.* No.

"(4) Did the defendant negligently fail to fasten or secure the board in question? *A.* No.

"(5) Ought the defendant in the exercise of ordinary care to have ascertained that the board in question was not safely

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fastened to the joists and have fastened it before the accident to plaintiff? *A.* No.

"(6) Ought the defendant in the exercise of ordinary care as a reasonably prudent person reasonably to have foreseen that the loose condition of this board was such that an injury might naturally and probably result to a workman exercising ordinary care for his safety who might walk upon the floor where this board was? *A.* No.

"(7) Did any want of ordinary care upon the part of the plaintiff contribute to cause his injury? *A.* No.

"(8) What sum of money will compensate the plaintiff for the injury he received from the accident of June 13th last? *A.* Five thousand dollars."

Judgment for defendant was rendered on this verdict. Plaintiff appeals.

For the appellant there were briefs by *Belle Quinlan* and *Kopp & Brunckhorst,* and oral argument by *L. A. Brunckhorst.*

For the respondent there was a brief signed by *Freeman & Geilfuss,* and oral argument by *R. R. Freeman.*

BARNES, J. The plaintiff urges that the court erred (1) in not awarding him judgment on the verdict, and (2) in not granting a new trial if he was not entitled to judgment on the verdict. A number of grounds for a new trial are argued.

The conclusion reached by this court on the defense of accord and satisfaction obviates the necessity for discussing any other question in the case. By its answer to the first question the jury found that the plaintiff at the time he signed the release was not able to understand its nature. The plaintiff testified that he had suffered a great deal of pain and had been taking morphine for relief and that he had no recollection of signing the release or of its contents. This evidence formed the basis of the answer of the jury to question 1.

By the answer to question 2 it was found that plaintiff did not sign the release under such false impression as to his

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rights and as to the character of the instrument as should in justice avoid it.

There is at least a seeming inconsistency between the answers to those two questions, but it is clear that the answer to the second question negatives the idea that any fraud was practiced on plaintiff or that he was subjected to undue influences or unconscionably dealt with.

The controlling question in the case is: Did the evidence warrant the jury in saying in effect that the release was not consciously signed by the plaintiff? The settlement was made twelve days after the date of the injury by one Spoor, an agent of the Fidelity & Casualty Insurance Company. It was made at the hospital where plaintiff was confined, and those present were plaintiff, Spoor, and Dr. Leitzel. Plaintiff's wife was present part of the time, but it does not appear that she took any very active part in making the settlement. Dr. Leitzel was the plaintiff's family physician and attended him after he received the injury. The plaintiff testified that Spoor called on him and told him he came to make a settlement for the injury and that he had a letter from the doctor saying that plaintiff would be able to sit up in ten days and to return to work in six weeks. Spoor denies making this latter statement. Plaintiff says he told Spoor that it was only twelve days since the injury occurred and that the plasters were not yet off and that he could not think of talking settlement unless the doctor was there to know his condition; that Spoor then asked him where the doctor lived and that he told him, and that Spoor went out and returned in a few moments saying the doctor was out; that Spoor remained a short time, during which the terms of settlement were not discussed; that Spoor then went out and returned with the doctor and that they then took up the question of settlement; that he asked the doctor how soon he would be able to sit up and how long it would be before he was able to work; that the doctor told him he would be able to sit up in a week and to

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go to work in eight weeks from the time he was hurt, and that he relied on such statement; that "Spoor said he had been informed that my wages were $28 a week and that under the Illinois law I would only get one half my wages and not to exceed $25 per week;" that he told Spoor he thought that under the Wisconsin law he would get sixty-five per cent. of his wages, but that Spoor insisted the matter would have to be settled under the Illinois law, and he did not see why Spoor should lie about it. There was some parleying as to the amount that should be paid the physician who attended him, and the amount finally settled upon was $225 for the plaintiff and $100 for the physician, which sums were accepted and the release executed. Plaintiff says that while Spoor was writing something, presumably the release or a check, he (plaintiff) remarked "it was kind of early for a man to settle with his back broke;" that Spoor replied that plaintiff's back was not broken, and that plaintiff then asked the doctor about it, but received no reply. Plaintiff further stated that he did not know whether he signed the release or not; that he had no remembrance of its having been read to him; that he knew his wife cashed a check for $225 the next day, but supposed it was for sixty-five per cent. of his wages under the Wisconsin law.

Spoor testified that the terms of settlement were discussed and agreed upon by himself and the plaintiff in the presence of plaintiff's wife and family physician, and that plaintiff was expressly informed that the release was a settlement in full and if signed plaintiff would not get anything more.

Dr. Leitzel testified that he did not tell plaintiff that he would be able to resume work in eight weeks; that he did say that if plaintiff continued to improve at the rate he had been improving he would be around in eight weeks, but that complications might set in, and that he did not advise plaintiff to make a settlement; that the statement he made about plaintiff's condition was an honest expression of opinion, and that

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complications did set in which rendered the plaintiff's injury much more serious than he supposed it would prove when the settlement was made; that the terms of settlement were discussed and he thought plaintiff understood what he was talking about; that he seemed natural to the witness.

Had the jury answered the second question in the special verdict in the affirmative, the case would present a very different aspect from what it now presents. The jury has on sufficient evidence negatived fraud in the transaction which resulted in the settlement. Compromise settlements are favored in the law when fairly made. The signing of an instrument raises a strong presumption that its contents are understood, and such presumption is not overcome by a mere statement of the signer that he did not understand the nature of the document which he signed. *Schweikert v. John R. Davis L. Co.* 147 Wis. 242, 249, 133 N. W. 136; *Ross v. Northrup, King & Co.* 156 Wis. 327, 336, 144 N. W. 1124; *Albrecht v. M. & S. R. Co.* 87 Wis. 105, 58 N. W. 72; *Conant v. Estate of Kimball,* 95 Wis. 550, 70 N. W. 74; *Jackowski v. Ill. S. Co.* 103 Wis. 448, 79 N. W. 757; *Kowalke v. Milwaukee E. R. & L. Co.* 103 Wis. 472, 79 N. W. 762; *Deering v. Hoeft,* 111 Wis. 339, 87 N. W. 298.

It is true the plaintiff says that he was and had been suffering a great deal of pain and that he had been taking morphine to relieve it. But he also says Spoor told him that he was there to settle with him, and that he refused to settle until his family physician was present. He details the conversation that took place, and after the amount to be paid was agreed upon he expressed some doubt as to whether he should settle or not until he knew more about the extent of his injuries. In fact he details what took place up to the time the agreement was arrived at and says his mind was a blank only when it came to actually signing the release which was prepared to carry out the contract on which the minds of the parties had met. When we consider the plaintiff's evidence

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in connection with that given by Spoor and Dr. Leitzel, it seems clear that the release was not impeached, if we are to follow the cases above cited and many others of like tenor and effect which are not cited but which are referred to in those that are.

By the Court.—Judgment affirmed.

DINGMAN and wife, Respondents, vs. HILBERRY and wife, Appellants.

November 20—December 8, 1914.

Specific performance: Oral contract to convey land: Evidence: Sufficiency: Definiteness of contract: Mutuality: Partial performance: Abandonment: Laches: Judgment.

1. In an action to compel specific performance of an agreement to convey land, the evidence is *held* sufficient to sustain findings to the effect that in 1900 defendant orally agreed to furnish the money to buy in his own name a farm for plaintiff, his son-in-law, that plaintiff could have all the time he required to pay defendant the purchase price, and that when he had made some substantial payment the title should be transferred to him; that in pursuance of such agreement a farm was purchased for $6,000, and plaintiff went into possession and occupied it for ten years, exercising all rights of ownership, paying taxes and making extensive and valuable improvements; and that plaintiff had paid to defendant on the purchase price sums aggregating more than $3,000.
2. Liberally construed, such contract meets all requirements for the enforcement of specific performance, being definite, mutual, founded upon valuable consideration, free from fraud or mistake, and reasonable in its scope and purpose.
3. Although the times of payment and time of conveyance were not fixed absolutely, yet the provision that plaintiff should have such time as he required to pay for the farm meant that he should pay as he was able, and his ability to pay, as well as what would constitute a substantial payment which would entitle him to a deed, were facts which could be ascertained with sufficient certainty.

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4. While the general rule is that the mutuality of a contract will be determined as of the time it was entered into, there are many exceptions. Conditional contracts, such as options to purchase land, that become binding only upon the happening of an event or the exercise of the choice granted, may be specifically enforced upon the happening of the event or the exercise of the option within the prescribed time, a mutuality of remedies when the case is ripe for a decree being sufficient.
5. In this case the partial and substantial performance of the contract by plaintiff, with his offer to complete performance, *would seem*, also, to be equivalent to an obligation on his part to perform.
6. The facts that after ten years' occupancy plaintiff temporarily left the farm upon defendant's request, to aid defendant in settling a domestic difficulty with his wife, and that, upon further payments being refused by defendant, he delayed bringing an action because defendant said he was going to deed the land to his daughter (plaintiff's wife) without further payments, did not show an abandonment of the contract by plaintiff or such laches on his part as to defeat the action.
7. A decree for specific performance in such case, by which defendant received the price paid by him for the farm, with interest, was not inequitable although the land had, largely through plaintiff's labor, greatly increased in value, the plaintiff being entitled to the benefit of his purchase upon complying with its terms.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Action for specific performance. The facts will sufficiently appear from the findings made by the trial court, which are as follows:

"(1) The plaintiff *Edmund C. Dingman* is a son-in-law of the defendants *Alfred Hilberry* and *Ella Hilberry,* his wife, the plaintiff *Myrtle Dingman* being a daughter of said defendants. The plaintiffs were married in July, 1900, and moved upon the lands in question in this action in March, 1901.

"(2) Soon after the marriage of the plaintiffs the defendant *Alfred Hilberry* advised the plaintiff *Edmund C. Dingman* to purchase a farm, and thereafter prior to March, 1900

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[1901], entered into an oral agreement with the plaintiff *Edmund C. Dingman,* whereby it was agreed that the defendant *Alfred Hilberry* would furnish the money with which to purchase a farm for the said plaintiff *Edmund C. Dingman.* That the plaintiff could have all the time he required in which to pay back the amount of the purchase price, and that the defendant *Alfred Hilberry* would take the title in his own name as security until such time as the plaintiff had made some substantial payments on the purchase price to the defendant, when it was agreed the title should be transferred to the plaintiff.

"(3) In pursuance of this agreement the plaintiff *Edmund C. Dingman* and the defendant *Alfred Hilberry* together examined a number of farms, and finally agreed upon a farm situated in the town of Sylvan in Richland county, Wisconsin, known as the Keys farm, described as follows, to wit: 'The southwest quarter, and the southwest quarter of the southeast quarter, of section 21, in town 11 north, range 2 west.'

"(4) That in furtherance of said oral agreement the parties purchased said farm, paying therefor the sum of six thousand dollars ($6,000), the defendant *Alfred Hilberry* taking the title deed therefor in his own name and paying the full amount of the purchase price himself.

"(5) That the deed of conveyance from Keys to *Alfred Hilberry* was made and executed on the 28th day of February, 1901, and that in furtherance of said oral agreement the plaintiffs entered into possession of said lands in March, 1901, and that they continued to occupy said lands for a period of ten years thereafter, the plaintiff *Edmund C. Dingman* exercising all the rights of ownership thereover, the lands being assessed to him, and he paying the taxes thereon from the time of said purchase up to the present time, and that during that time the plaintiff *Edmund C. Dingman* made extensive and valuable improvements thereon, such as building new fences, clearing the lands of stumps, and other general improvements including the rebuilding and repairing the house thereon, the repairs on the dwelling house alone amounting to about $700.

"(5a) That the plaintiff *Edmund C. Dingman,* in furtherance of said oral agreement with the defendant, made

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payments on the purchase price of said lands to the defendant *Alfred Hilberry* as follows:

December, 1901	$300 00
December, 1902	350 00
January 12, 1903	700 00
November 26, 1904	500 00
December 23, 1905	600 00
December 29, 1906	580 00
Total	$3,030 00

"(6) That the total amount of the payments made by the plaintiff *Edmund C. Dingman* on the purchase price of said lands aggregated the sum of $3,030, and that the same was paid to the defendant *Alfred Hilberry* by the plaintiff upon the purchase price of said lands and were received by the said *Alfred Hilberry* as such, and that the defendant accepted said payments and still retains the same.

"(7) That the plaintiff *Edmund C. Dingman,* in 1907, tendered to the defendant *Alfred Hilberry* another payment of $500 on said lands, which the defendant refused to accept and has ever since continued to refuse to accept further payments from the plaintiff.

"(8) That in 1911 the defendants *Alfred Hilberry* and *Ella Hilberry* became involved in domestic troubles which culminated in the bringing of an action for divorce on the part of the defendant *Ella Hilberry,* and upon the representations of the defendants, and particularly of the defendant *Alfred Hilberry,* that their domestic troubles were caused by dissensions among their children over property matters, and being desirous of effecting a reconciliation between the defendants, the plaintiffs were induced, by the request of the defendant *Alfred Hilberry,* to surrender possession of said lands to *Alfred Hilberry* temporarily, until such time as the defendants could adjust their domestic difficulties, the defendant *Alfred Hilberry* promising and agreeing to convey said lands to the plaintiff *Edmund C. Dingman* in accordance with their former oral agreement, and surrender full possession thereof to the plaintiffs as soon as the said *Alfred Hilberry* had effected a settlement of his domestic troubles.

"(9) That upon the request and upon the representations of the defendant *Alfred Hilberry* as aforesaid the plaintiffs removed from said farm in 1911, and the defendant *Alfred*

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Hilberry thereupon leased the same to a tenant, who still remains on said premises.

"(10) That afterwards in 1911 the said defendants adjusted their domestic troubles by the defendant agreeing to lease the farm of the plaintiffs aforesaid to the defendant *Ella Hilberry* and to give her the proceeds thereof during her lifetime, which agreement was executed in writing and the divorce action thereupon dismissed, the defendants resuming their nuptial relations and living together at their former home.

"(11) That the defendant *Ella Hilberry* has never been in actual possession of said lands, but continues to reside with her husband, *Alfred Hilberry*, and that she had full knowledge of the agreement between the plaintiff *Edmund C. Dingman* and her husband, *Alfred Hilberry*, from the time of the making of said agreement and at the time of the settlement of said divorce proceeding brought by her, and that she had full knowledge, at the time of making such settlement of her divorce action, of the representations made to the plaintiffs by which they were induced to surrender possession of the farm to her husband, *Alfred Hilberry*, and of their claim of ownership thereto.

"(12) That the plaintiff *Edmund C. Dingman* has fully performed all of said oral agreement on his part to be performed.

"(13) That the amount which the plaintiff should pay for said lands is $6,000 with interest thereon at six per cent. per annum from the 28th day of February, 1901. That the plaintiff has paid thereon the sum of $3,030, and is entitled to credit therefor in the amount of each payment as of the time when such payment was made.

"(14) That the value of the said farm is $500 a year, and that the defendant *Alfred Hilberry* took possession of said farm in March, 1911, and is accountable to the plaintiff *Edmund C. Dingman* from that date for rent on said farm at the rate of $500 per year.

"(15) That the amount due and owing to the defendant *Alfred Hilberry* from the plaintiff *Edmund C. Dingman* as the balance of the purchase price of said lands is $6,906.52.

"(16) That the amount due to the plaintiff *Edmund C. Dingman* from the defendant *Alfred Hilberry* for the use of

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said farm is $1,000, being the rental on said farm for two seasons at $500 per year, which in this case must be taken to mean the farming season."

As conclusions of law the court found:

"(1) It follows from the foregoing facts as found by the court that judgment in this action must go for the plaintiff for specific performance of the contract.

"(2) That the plaintiff *Edmund C. Dingman* is entitled to deduct from the $6,906.52 now due upon the purchase price of said farm the sum of $1,000, being the amount now owing to the plaintiff from *Alfred Hilberry* for the use of said farm for two years, and upon payment of the balance, to wit, the sum of $5,906.52, to the said defendant *Alfred Hilberry,* or to the clerk of this court for his benefit, the said *Alfred Hilberry* shall execute and deliver to the said *Edmund C. Dingman* a good and sufficient deed of conveyance for said above described lands, free from all incumbrance, or, in default thereof, then such judgment to have the same force, effect, and operation as such deed.

"(3) That the plaintiffs are entitled to have their costs and disbursements herein."

From a judgment entered accordingly the defendants appealed.

For the appellants there were briefs by *P. L. Lincoln,* attorney, and *Jones & Schubring,* of counsel, and oral argument by *Mr. B. W. Jones* and *Mr. Lincoln.*

For the respondents there was a brief by *Bancroft & Johns,* and oral argument by *L. H. Bancroft.*

VINJE, J. Defendants claim (1) that the evidence is too vague, uncertain, and conflicting to establish with the requisite certainty the contract found by the court to have been made; (2) that the contract as found by the court is so uncertain and unilateral that it ought not to be enforced by specific performance; (3) that plaintiffs abandoned the contract and have been guilty of laches in seeking redress; and (4) that it would be inequitable to decree specific performance.

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1. In view of the relation of the parties and the fact that the contract was oral and entered into more than ten years previous to the trial, it is not a matter of surprise that there should be not only a conflict but also some vagueness in the evidence. A definite contract, however, may be found and satisfactorily established upon conflicting testimony. The facts and circumstances surrounding a transaction may be such as to make certain and satisfactory that which is left vague and doubtful resting upon the oral testimony alone. The contract found by the court is quite a natural and probable one. A well-to-do farmer with more money on hand than he needs agrees to buy a farm for a newly acquired son-in-law, deed it to him when a substantial part of the purchase money is paid, and give him such time as he may require in which to pay for it. A farm is found; $6,000 is paid for it and the deed taken in the name of the father-in-law. The son-in-law is put in possession, occupies, tills, and improves the farm for over ten years, pays the taxes on it, and makes payments aggregating over half the original purchase price. We have examined the evidence with care and are satisfied that, taken in connection with the subsequent conduct of the parties, it sustains with the clearness requisite in such cases the findings of the court as to what the contract was.

2. In the contract found by the court these essentials are definite: the grantor, the grantee, the consideration, and the premises to be conveyed. Only the time of conveyance and the times of payment are not fixed absolutely. But they are sufficiently fixed so that they can be ascertained to a reasonable certainty. While it may be a matter of some difference of judgment as to what constitutes a substantial payment on a $6,000 purchase, yet that is no more difficult to determine than what is a reasonable time in which to make a payment. Contracts which fail to provide for time of payment must be paid within a reasonable time, but they are not held void for uncertainty on that account. *Boyington v. Sweeney,* 77

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Wis. 55, 45 N. W. 938; *Lawrence v. M., L. S. & W. R. Co.* 84 Wis. 427, 54 N. W. 797; 9 Cyc. 611. So, too, the provision as found by the court that the son-in-law should have such time as he required within which to pay for the farm, means that he should pay as he was able. His ability to pay was a fact that could also be ascertained with that degree of certainty required in the enforcement of contracts.

What was said by the court in *Inglis v. Fohey,* 136 Wis. 28, 33, 116 N. W. 857, applies peculiarly to the present case:

"If, by aid of evidence showing the situation and surroundings of the parties at the time, and their subsequent acts, if any, construing the terms of the writing, the court can with reasonable certainty determine the meaning intended by the parties, the court will not allow the contract to fall, but will construe it in the light of such evidence and enforce its terms as so construed, if there be no other fatal objections to it."

That was also an action for specific performance. Perhaps as striking a case as can be found reported showing the definiteness required in a contract in order to entitle it to specific performance is that of *Hannon v. Scanlon,* 158 Wis. 357, 148 N. W. 1082. There it was held that an agreement to deed one of two specified forty-acre tracts to each of two children could not be enforced specifically because it did not appear which tract was to be deeded to each child, nor could it be enforced as a contract to convey two undivided forty-acre tracts to both as tenants in common because that was not the agreement. But there were in that case no surrounding facts and circumstances or subsequent conduct of parties to which recourse could be had to make the agreement more definite and certain. The agreement itself was definitely uncertain. While the general rule is that the mutuality of a contract will be determined as of the time it was entered into, there are many exceptions to it. Conditional contracts, such as options to purchase land, that become binding only upon the happening of an event or the exercise of the choice

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granted, fall outside the rule as to mutuality at the time of their execution, yet they may be specifically enforced upon the happening of the event or the exercise of the option within the prescribed time. *Wall v. M., St. P. & S. S. M. R. Co.* 86 Wis. 48, 56 N. W. 367; *Mueller v. Nortmann,* 116 Wis. 468, 93 N. W. 538; *Sizer v. Clark,* 116 Wis. 534, 93 N. W. 539; *McCormick v. Stiphany,* 57 N. J. Eq. 257, 41 Atl. 840. If there is a mutuality of remedies when the case is ripe for a decree that is sufficient. 7 Modern Am. Law, 24. Here the son-in-law alleges his ability to pay the whole amount due, and under the terms of the contract the father-in-law could sue for damages for a breach of contract to purchase if the son-in-law refused. There are also cases like *Howe v. Watson,* 179 Mass. 30, 60 N. E. 415, where the time for specific performance does not come till there has been a full performance by the party seeking it. In that case plaintiff agreed to take care of her sister till she died, on condition that she should leave all her property to plaintiff. The latter performed her part of the contract and the sister died intestate leaving both real and personal property. In an action for specific performance it was held, there being no obligation on the part of the plaintiff to perform, that so far as respects the right of specific performance an actual performance was equal to an obligation to perform. In the case at bar there has been a partial and substantial performance with an offer to perform the balance, and no good reason is perceived why that is not equivalent to an obligation to perform.

But the decision need not be based on the ground that a part performance is equivalent to an obligation to perform, for, liberally construed, the contract itself meets with the requirements entitling it to specific performance. It is definite, mutual, and founded upon a valuable consideration. It is free from fraud or mistake, and is reasonable in its scope and purpose. These are the essential requisites. *Mulligan v. Albertz,* 103 Wis. 140, 78 N. W. 1093.

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3. The claim that the plaintiffs have abandoned the contract or have failed to seasonably seek the aid of a court of equity is not well founded. They left the farm upon the request of the father-in-law in order to aid him in settling a domestic difficulty with his wife, and no doubt they delayed action after further payments were refused because he told them he was going to deed the land to the plaintiff *Myrtle Dingman* without further payments. So he is responsible for both the abandonment of the farm and the delay in bringing the action.

4. We fail to see anything inequitable in decreeing specific performance. So far as appears from the evidence, $6,000 was the value of the farm in 1901 when it was bought. The father-in-law receives that sum with legal interest. It is now claimed to be worth $18,000. The son-in-law was entitled to the benefit of his purchase by complying with its terms. His labor for ten years added greatly to the value of the farm and it is no more than just that he should reap the reward thereof.

By the Court.—Judgment affirmed.

FOOTE, Respondent, vs. FOOTE, Administrator, Appellant.

November 20—December 8, 1914.

Appeal: Exceptions, when necessary: Homestead: Devise to children: Equitable conversion: Liability for debts.

1. No exception to a mere conclusion of law is ever necessary.
2. Thus, although the findings of the trial court were not excepted to and there is no bill of exceptions, so that the only question is whether the judgment appealed from is sustained by the pleadings and the findings, a fact appearing from the pleadings without dispute and the question whether, in view of that fact, the conclusion of law on which the judgment is based is correct, are fairly before the appellate court.
3. Even were an exception technically necessary in such a case, the supreme court might nevertheless, under sec. 2405*m*, Stats., decide the question on the merits.

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4. The mere fact that it is necessary to sell the homestead of a testator in order to divide it between his children to whom he devised it and who were, under sec. 2280, Stats., entitled to "take the same free of all judgments and claims against the testator or his estate," does not render the proceeds of such sale subject to the payment of the general debts of the estate.

APPEAL from an order and a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Appeal from order dismissed; judgment reversed.*

This is an appeal from a judgment of the circuit court affirming a judgment of the county court of Grant county directing the payment of the debts proven against the estate out of the proceeds of the sale of the homestead of the deceased. It appeared by the record returned by the county court to the circuit court that the testator, David Foote, died in July, 1904, leaving a will which was subsequently duly probated, by which he gave to his widow the "full control" of his estate during life and after her death directed an equal division of the estate among his surviving children. The estate consisted of a homestead and a small amount of other property. Claims against the estate were allowed to the amount of $1,350. The property outside of the homestead was sold and converted into money and used to discharge expenses of administration, but did not produce enough to discharge the debts. The widow died, and after her death, upon application for construction of the will, the county court held that the will by its terms worked an equitable conversion of the real estate into personal property and that the administrator should sell the homestead in order to carry out the provisions of the will. This was done and the sum of $2,800 realized therefrom. Thereupon the administrator rendered his final account, charging himself with the net proceeds of the homestead and praying that the same be assigned to the surviving children of the testator in accordance with the terms of the will. The creditors appeared at the hearing and claimed that the debts which had been allowed and not paid should be discharged from the moneys received from the sale of the homestead be-

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fore distribution to the devisees. The county court so ordered, and upon appeal to the circuit court the order was affirmed, that court holding that the sum in the hands of the administrator "is available and liable for the payment of debts and expenses of administration" of the estate. No bill of exceptions was settled in the circuit court.

For the appellant there was a brief by *T. L. Cleary,* attorney, and *G. E. Cleary,* of counsel, and oral argument by *George Cleary.*

For the respondent there was a brief by *Brown, Brennan & Carthew,* and oral argument by *H. E. Carthew.* They contended, *inter alia,* that under facts similar to those here, except as involving the question of homestead, this court has repeatedly held that the court will deal with the estate as personal from the death of the testator, and that the bequests in such a will must be considered as bequests of personalty only. *Chandler's Appeal,* 34 Wis. 505; *Dodge v. Williams,* 46 Wis. 70, 97, 1 N. W. 92, 50 N. W. 1103; *Gould v. Taylor Orphan Asylum,* 46 Wis. 106, 50 N. W. 422; *Webster v. Morris,* 66 Wis. 366, 28 N. W. 353; *Milwaukee P. Home v. Becher,* 87 Wis. 409, 58 N. W. 774; *Hood v. Dorer,* 107 Wis. 149, 82 N. W. 546; *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650; *McWilliams v. Gough,* 116 Wis. 576, 93 N. W. 550; *Albiston's Estate,* 117 Wis. 272, 94 N. W. 169; *Williams v. Williams,* 135 Wis. 60, 115 N. W. 342. In *Ford v. Ford,* 70 Wis. 19, 53, 33 N. W. 188, the court considers the matter of conversion of a homestead and indicates that, except as to the right of election of the widow, the effect is the same as in other cases. The proceeds of realty converted by will, being personal property, may be applied to the payment of debts. 9 Cyc. 835, 836, 851; *Personeni v. Goodale,* 199 N. Y. 323, 92 N. E. 754.

WINSLOW, C. J. A motion on the part of the appellant to extend the time for settlement of a bill of exceptions and for leave to file exceptions to the findings was denied by the circuit court and an appeal is taken from that order as well as

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from the judgment. In the view which we have taken of the case it becomes unnecessary to decide whether this order should have been made or not, and we pass the question.

In our judgment the question whether the proceeds of the homestead may rightfully be used to pay the debts of the estate is squarely presented by the record. By that record it appears as a fact that the administrator has in his hands $2,800 which is the proceeds of the sale of the homestead, and that both the county and circuit courts have concluded as matter of law that under the terms of the will the debts of the deceased must be first paid out of this sum. No exception to a mere conclusion of law is ever necessary. *Wis. River I. Co. v. Lyons,* 30 Wis. 61; *Towsley v. Ozaukee Co.* 60 Wis. 251, 18 N. W. 840. The question is whether the judgment is sustained by the pleadings and findings. *Weyerhaeuser v. Earley,* 99 Wis. 445, 75 N. W. 80. The pleadings here consist on the one side of the final account of the administrator and the accompanying petition for its allowance, showing that he has in hand $2,800 which constitutes the proceeds of the sale of the homestead; on the other side, of the objection by the creditor to the allowance of the account for the reason that there were yet debts of the estate to be paid and that the funds in the administrator's hands were liable for that purpose. The fact that those funds were the proceeds of the homestead was not challenged by this objection. It has not been challenged at any stage of the proceedings, nor is it challenged by the findings of fact made by the circuit court. So the question simply is whether the conclusion of law, namely, that this sum is first chargeable with the debts of the deceased, is correct, and this question, even under the former practice, requires no exception to bring it fairly before us. Under sec. 2405*m,* Stats., however, this court could and doubtless would consider and decide the question on the merits even were an exception technically necessary. Since the passage of the last named section the court is not

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compelled in any case to sit still and see a miscarriage of justice go uncorrected simply because of a failure to file an exception.

Both courts held that, because it was necessary to sell the homestead in order to carry out the provisions of the will, the proceeds of the sale lost the homestead character and became subject to the payment of the general debts of the estate.

We deem this view as radically erroneous. Our legislative policy has been to protect the homestead from liability for the general indebtedness of the owner both before and after the owner's death, and whether he died testate or intestate, except in case the deceased left neither widow, children, nor grandchildren. Secs. 2271–2280, Stats. 1913. The last named section specially provides that the devisee of a homestead shall take the same free "of all judgments and claims against the testator or his estate" except mortgages and mechanics' liens. In the present case the children of the deceased were the devisees of the homestead. Under the law they were entitled to receive it free of all judgments and claims. Could that right be taken away because it became necessary, or was thought necessary, to sell the homestead to carry out the will? Manifestly not. The doctrine of equitable conversion is really a fiction by which, for certain purposes, the most frequent of which is to carry out the purpose of a testator, realty will be treated as personalty. It has been well said that "it should never be overlooked that there is no real conversion; the property remains in fact realty or personalty as it was, but for the purpose of the will, so far as it may be necessary and only so far, it is to be treated in contemplation of law as if it had been converted." *Yerkes v. Yerkes,* 200 Pa. St. 419, 50 Atl. 186.

The most frequent examples of the application of the doctrine are those cases in which real property is devised for trust purposes and directed to be sold, the trust being one which, so far as real estate is concerned, the law would not

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or could not carry out, but which is perfectly valid as applied to personalty. In these cases the law will, in order to effectuate the purpose of the testator, deem that done which ought to be done and treat the property devised as personalty even before its actual conversion. *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650; *Albiston's Estate,* 117 Wis. 272, 94 N. W. 169.

But the real estate does not in fact become personal property until its actual sale and conversion into money. So in the present case it must be true that, when the testator died, the title to this homestead passed by virtue of the devise in the will to the testator's children, subject to the widow's life interest therein, and such title being then free from judgments and claims under the provisions of sec. 2280 no sale thereafter made could logically divest the devisees of their right to the clear proceeds. The doctrine of equitable conversion is not to be invoked to deprive persons of vested rights. It is true that the testator may always, subject to the rights of his widow, dispose of his homestead as he sees fit and may charge it with the payment of debts or administration expenses (*Will of Madden,* 104 Wis. 61, 80 N. W. 100), but the testator in the present instance has done nothing of that kind.

By the Court.—The appeal from the order is dismissed without costs. Upon the appeal from the judgment the same is reversed, with costs, and the action remanded with directions to enter judgment in accordance with this opinion.

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FARMERS & MERCHANTS BANK, Respondent, vs. CITY OF RICHLAND CENTER, Appellant.

November 20—December 8, 1914.

Taxation: Bank stock, when taxable.

Where the capital stock of a banking corporation whose articles of incorporation had previously been filed was subscribed for, and, except as to a few shares, paid for and the certificates of stock issued prior to May 1, 1913, the stock was taxable in that year, although the certificate of the banking commissioner authorizing the corporation to commence the business of banking was not issued until May 12, 1913.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Action to recover money paid under protest to the treasurer of defendant as taxes.

In January, 1913, under the law of this state plaintiff's articles of organization as a banking corporation were duly filed and subsequently, before the 1st day of May, all steps were taken to authorize it to commence business as such, except payment for a few shares of stock and obtaining a certificate of competency of the commissioner of banking, as required by sec. 2024—10, Stats. As indicated, prior to May 1, 1913, the $50,000 of stock of the corporation was subscribed for and, except for a small amount, was paid for and certificates of stock were duly issued to the subscribers. The subscription price for the stock was $110 for each $100 share, payable twenty-five per cent. down and the balance on or before March 15, 1913. The required certificate of competency was obtained prior to May 12, 1913. Thereafter the assessor of defendant, in due form, assessed the capital stock to the stockholders and the bank's real estate to it. In due course, taxes on the stock to the amount of $1,193.69 were extended upon the tax roll of defendant, as and for taxes on such stock for 1913 and were paid under such circumstances as to entitle plaintiff to recover the same back, in case of the

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property not being liable to taxation for such year. Thereafter plaintiff, in due form and time, presented its claim for a refund of such money to the common council of defendant and it was rejected. Thereupon it appealed to the circuit court from such disallowance.

Upon such facts the trial court decided that the capital stock of the bank was not taxable for the year 1913, and rendered judgment accordingly.

O. D. Black, attorney, and *Burr W. Jones,* of counsel, for the appellant.

For the respondent there was a brief by *Bancroft & Johns,* and oral argument by *L. H. Bancroft.* They contended that a state bank cannot be taxed as a bank before it has any legal existence as such or any authority to transact any business as a bank. Secs. 1034, 1040, 1051, 1057*b,* 2024—10, 2024—12, 2024—78*m,* Stats.; 37 Cyc. 825; *Farmers' L. & T. Co. v. Newton,* 97 Iowa, 502, 66 N. W. 784; *People ex rel. Mut. T. Co. v. Miller,* 177 N. Y. 51, 69 N. E. 124; *Manufacturers' & M. Bank v. Comm.* 72 Pa. St. 70; Bouvier, Law Dict. "Bank;" *Reed v. People,* 125 Ill. 592, 18 N. E. 295, 1 L. R. A. 324; *Farmers' & M. Bank v. Baldwin,* 23 Minn. 198; *Wells, Fargo & Co. v. N. P. R. Co.* 10 Sawy. 441, 23 Fed. 469; *People ex rel. Att'y Gen. v. Utica Ins. Co.* 15 Johns. 357; *Exchange Bank v. Hines,* 3 Ohio St. 1.

MARSHALL, J. The question of whether the capital stock of respondent was taxable for 1913 must be solved by the written law. Decisions elsewhere in respect to the matter are more liable to mislead than illumine, as is quite well evidenced by the history of this case.

By secs. 1033 and 1034, Stats., all property existing in this state on the 1st day of May in any year, subject to some exceptions which do not include bank stock, is subject to taxation for such year.

By sec. 2024—9, Stats., upon articles of incorporation of a bank being filed, as in this case, a banking corporation is

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created, having all the powers of any such corporation under the laws of this state excepting that of prosecution of the business of banking, which waited upon obtaining a certificate of competency from the commissioner of banking under sec. 2024—10, Stats., within one year after creation, failure of which to be penalized by the corporation ceasing to exist.

As a condition of obtaining such certificate of competency, it is provided in sec. 2024—12, Stats., that the authorized capital must be fully paid in and all conditions precedent to the corporation commencing business be complied with, as was the case in the particular instance, before the 1st day of May, 1913, except as to a few shares as to which certificates were held to await full payment for the stock.

So in view of the facts and the law, the respondent bank was an existing corporation on the 1st day of May, 1913, with full-paid capital stock, except as to the few shares, and with certificates of stock duly issued. The value of the outstanding stock was not affected by the fact that the certificate of competency had not been obtained. It was in existence with a value presumably equal to its cost of $110 per share. It seems that such situation answers to all the essentials of the statute as to taxation of such property. By what authority the court can say that the stock was not subject to taxation, upon the theory that the thing having a physical existence and of full value did not exist at all, because of present incompetency of the bank to do business, is not perceived. Had the certificate of competency not been obtained within the year limited by the statute, and the penalty of extinguishment had become operative, the value of the shares would have substantially remained. Each certificate holder would have been entitled to his *pro rata* share of the corporate property and the corporation have remained in practical existence for the purposes of liquidation.

By the Court.—The judgment is reversed, and cause remanded with directions to dismiss the same with costs to the defendant.

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WILL OF MORSE: BALSINGER, Respondent, vs. SCHRUNK, Appellant.

November 21—December 8, 1914.

Wills: Execution: Mental capacity: Undue influence: Evidence.

Findings to the effect that a will was signed and duly executed by the testatrix, that she had testamentary capacity, and that it was not the result of undue influence, are *held* to be supported by the evidence.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

The appeal is from a judgment of the circuit court for Grant county which affirmed the judgment of the county court of that county admitting to probate the will of Barbara Ann Morse, who died March 18, 1913, aged sixty-eight years. This will was made March 15, 1913. The will disposes of the estate by giving to her brother *Christopher C. Balsinger* a farm of about sixty acres and the personal property that remained after the payment of her debts and funeral expenses, and the residue of her real estate, consisting of 200 acres of bottom lands near to the Mississippi river, she gave to this brother *Christopher* and her brother Berman H. Balsinger to have and to hold for the term of their natural lives and after their death to her legal heirs. She appointed *Christopher C. Balsinger* executor of the will, requesting that he be not required to give bonds, and authorized and empowered him to compromise and settle all claims or demands that existed either in favor of or against her estate. The will was signed at the foot and followed by an attestation clause in the usual form declaring that the testatrix signed and declared this to be her last will in the presence of the subscribing witnesses, who signed it at her request and in her presence. The witnesses signed as follows: "Jacob Shrake, Notary Public, Bagley, Wis.; Dr. Lewis H. Ruttenberg, M. D., Bagley, Wis.; Fred E. Patch, Bagley, Wis."

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Sarah E. Schrunk, who is a daughter and sole heir at law of the testator, filed objections to the probate of the will, alleging that the testatrix at the time of the execution of the will was mentally incompetent to make the will; that the will was obtained by undue influence exercised upon her to an extent that it was not her will; and that the will was not signed and executed by her as required by law.

The county and circuit courts after hearing the testimony in the case found that the instrument was signed and in all respects executed as a will pursuant to the statutes, that the testatrix had testamentary capacity to make the will, and that it was not made as the result of undue influence exercised upon her, and admitted the will to probate as the last will and testament of the deceased.

The cause was submitted for the appellant on the brief of *S. E. Smalley,* and for the respondent on that of *Brown, Brennan & Carthew.*

SIEBECKER, J. The question on this appeal presents the inquiry, Does the evidence sustain the conclusion of the trial court finding that the instrument was in fact signed by the testatrix as required by law, that she was mentally competent to make this will and that she was not unduly influenced to make it, and that it expresses her free and voluntary testamentary disposition of her estate? The making and the execution of the will were not characterized by any unusual circumstances, nor do her actions in the matter or those whom she called to her assistance to draw the will and participate in its execution indicate that she was coerced or wrongfully influenced to interfere with her free and voluntary act of making a testamentary disposition of her property. The evidence bearing on the mental competency of the testatrix at the time this instrument was made and signed by her as her last will clearly supports the conclusion of both the county and circuit courts and therefore cannot be disturbed on appeal. The evi-

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dence on all the issues litigated on the trials is direct and positive and presented to the lower courts simple inquiries of facts, depending largely upon the probative force of the evidence given *pro* and *con* by the several witnesses. It would serve no useful purpose to recite the evidence here. The findings of the circuit court must be approved and the judgment admitting the will to probate stand.

By the Court.—The judgment appealed from is affirmed.

TRZEBIETOWSKI, Respondent, vs. JERESKI, Appellant.

November 21—December 8, 1914.

Seduction: Loss of services: Evidence: Exclusion of questions: Prejudicial error: Relevancy: Previous unchastity: Instructions to jury: Degree of proof.

1. In an action by a father for loss of his daughter's services by reason of her seduction which resulted in the birth of an illegitimate child, a verdict for plaintiff is *held* to be supported by sufficient evidence, although the question is a close one, turning upon the veracity of the daughter and of the defendant.
2. To a question as to how the birth of the illegitimate child affected him, plaintiff answered "It affected me so that I would rather see the girl was dead or me." *Held*, that the question was proper and the answer responsive.
3. Where a question does not indicate the nature of the evidence sought to be elicited or that the witness has any knowledge on the subject, and there is no offer of proof or statement of what is expected to be shown by the answer, the error, if any, in excluding the question cannot be said to be prejudicial.
4. Defendant having, for the purpose of showing previous unchastity of plaintiff's daughter, introduced testimony to the effect that while riding in a farm wagon, when about fourteen years old, she had thrust her hand through an opening in the seat and playfully tickled the driver on his side, the court properly directed the jury to disregard such testimony, there being nothing in the incident indicating depravity.
5. In a civil action where one of the facts essential to a recovery also constitutes a crime the jury must be satisfied of the existence

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of such fact by a clear and satisfactory preponderance of the evidence; but an instruction in this case that the jury must be satisfied "by a fair preponderance of the evidence and to a reasonable certainty," is *held* to be so slight a departure from the rule that, in the absence of any request for more explicit instructions, the error cannot be deemed prejudicial.

APPEAL from a judgment of the circuit court for Trempealeau county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *R. S. Cowie,* attorney, and *Gaveney & Barlow,* of counsel, and oral argument by *Mr. Cowie.*

Frank C. Richmond and *John A. Markham,* for the respondent.

TIMLIN, J. This appeal is by defendant from a judgment for $2,250 damages and $128.53 costs in favor of the plaintiff, the father of the witness Helen, given in an action in form for loss of services, in substance for damages resulting from her seduction or ravishment resulting in pregnancy and the birth of an illegitimate child. The learned counsel for appellant make a vigorous and able presentation of the case, principally on the ground of the inadequacy of the evidence to support the verdict. The question is a close one and turns upon the veracity of Helen and that of defendant. We regard the evidence as presenting a case for the jury, and it would be largely guesswork for us to attempt to decide which of the witnesses, Helen or the defendant, is telling the truth. The learned circuit judge saw these witnesses and heard the evidence, and he added the weight of his opinion to that of the jury when he refused to grant a new trial. It would answer no good purpose to spread upon these pages the details of the evidence. We must hold that there was evidence to support the verdict.

Passing to the other assignments of error. It having appeared in evidence that Helen had given birth to an illegitimate child, the plaintiff as a witness in his own behalf was

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asked how this affected him. He answered: "It affected me so that I would rather see the girl was dead or me." The question was proper and the answer was responsive to the question. In cross-examination of the plaintiff the following question was asked relative to a grown-up daughter then residing in Winona, Minnesota: "What is she doing now?" An objection of plaintiff to this question was sustained. There was no offer of proof, there was no statement of what was expected to be shown by the answer, and it is impossible for this court to say under such circumstances that the ruling, even if erroneous, was prejudicial. Defendant sought to prove by a witness on the stand the interior arrangement of plaintiff's house. An objection to such evidence was sustained, the court saying in making such ruling: "If you want to make an offer make it in writing and I will rule upon it." No such offer was made and we therefore cannot say the ruling was prejudicial. Where the question does not indicate the nature of the evidence sought to be elicited or that the witness has any knowledge on the subject and there is no offer of proof, it is manifestly impossible to say that prejudicial error affirmatively appears from a ruling sustaining an objection to such a question. This is an effect of sec. 3072*m*, Stats., which counsel would do well to keep in mind.

It is said the court erred in instructing the jury to disregard the testimony of one Rudnik. In order to show in mitigation of damages that Helen, who was between fifteen and sixteen years of age at the time of her seduction, was before that time unchaste, the defense offered the testimony of one Rudnik, a farmer for whom the girl worked when about fourteen years of age. This testimony was to the effect that on one occasion while riding on a farm wagon, Rudnik in the seat and the girl Helen and two other children standing up behind the seat, Helen thrust her hand through the opening in the back of the seat and playfully tickled Rudnik on his side. The circuit court rightfully told the jury to disregard

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this evidence. It requires the stimulus of extraordinary zeal to see anything indicating depravity in this incident.

The most serious question is upon exception to an instruction in the following words:

"In order to entitle the plaintiff to recover, it is necessary that you be satisfied by a fair preponderance of the evidence and to a reasonable certainty that the defendant is the person who had sexual intercourse with her. If you are so satisfied you should find for the plaintiff. If you are not so satisfied you should find for the defendant."

Appellant's counsel correctly contend that in a civil action, where one of the facts essential to recovery also constitutes a crime, the rule is that it is necessary that the jury be satisfied of the existence of such fact by a clear and satisfactory preponderance of the evidence. *Poertner v. Poertner,* 66 Wis. 644, 29 N. W. 386. Instead of using the words "clear and satisfactory" the learned circuit judge used the word "fair." He did, however, add to the rule as stated in the case last mentioned the words "to a reasonable certainty."

It is quite difficult to determine whether a clear and satisfactory preponderance of evidence requires greater convincing power of evidence than a fair preponderance of evidence and to a reasonable certainty. The last expression would seem to require that the evidence reach the degree of fair preponderance, and also establish the fact to which it is directed to a reasonable certainty; while the former expression requires only a clear and satisfactory preponderance of the evidence.

In *Klipstein v. Raschein,* 117 Wis. 248, 94 N. W. 63, the instruction closely followed the rule of the *Poertner Case* but omitted the word "satisfactory," thereby advising the jury that if the proof failed to establish any of the material facts by a clear preponderance of the evidence the plaintiff could not recover. The words "to a reasonable certainty" were not used. It was held that the charge there complained of was

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equivalent to that approved in the *Poertner Case.* Although the words "to a reasonable certainty" were not used either in the *Poertner Case* or the *Klipstein Case* the opinion goes on to say: "In the very nature of things no fact can be established to a reasonable certainty, the certainty required in any civil action, by less than a preponderance of the evidence, nor established with such certainty, clearly, by less than a clear preponderance of the evidence, the clear weight of evidence." It was then said that the expressions "clear preponderance of the evidence" and "clear and satisfactory evidence" were substantial equivalents.

Neacy v. Milwaukee Co. 144 Wis. 210, 219, 128 N. W. 1063, reads as follows:

"True, as has been suggested upon previous occasions, the distinction between establishment of a fact by a preponderance of the evidence to a reasonable certainty, and establishment thereof to such certainty by clear and satisfactory evidence, may be somewhat shadowy; but it is considered that there is such a distinction which is so substantial that a definite rule in respect thereto was logically formulated at an early day and has become a significant feature of our judicial system. Such feature must, necessarily, vary in importance according to the depth of moral turpitude of the fraud alleged."

In *Larson v. Foss,* 137 Wis. 304, 118 N. W. 804, speaking of the rule as applied to an ordinary issue of fact in a civil case and the departure from that rule by the circuit court, it was said that more explicit instructions on this point should have been asked for, citing *Curran v. A. H. Stange Co.* 98 Wis. 598, 74 N. W. 377.

It seems to us that the departure here from the established rule is slight and that in the absence of a request for more explicit instructions we cannot regard the instruction as here given prejudicial. It must have been understood by counsel and the court, hence presumably by the jury, as stating the

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substantial equivalent of the rule laid down in *Poertner v. Poertner,* 66 Wis. 644, 29 N. W. 386. Other questions have been considered, but we find no sufficient reason for reversing the judgment of the court below.

By the Court.—Judgment affirmed.

PENNELL, by guardian *ad litem,* Respondent, vs. RUMELY PRODUCTS COMPANY, Appellant.

November 21—December 8, 1914.

Negligence: Exhibiting machinery at fair: Injury to spectator: Lack of guard railing: Concurring negligence of third person: Instructions to jury: Harmless errors.

1. In an action for injury to plaintiff whose arm was caught between a belt and pulley on a threshing machine exhibited by defendant at a county fair, the evidence is *held* sufficient to warrant the jury in finding that at the time of the accident plaintiff was descending the steps of a viewing platform near the machine, which steps, unlike the platform itself, were not provided with a railing, and that the absence of a suitable railing was the proximate cause of the injury.
2. If the defendant, exhibiting such machinery in operation, should reasonably have anticipated that injury might probably result to some person exercising ordinary care if guard rails were not provided for the steps of the viewing platform, it was negligent in failing to provide them, and is liable to a person who, without fault on his part, was injured by reason of the lack of such rails.
3. If, as the testimony tended to show, another spectator jostled the plaintiff as he was descending the steps, causing him to fall toward the machine and get his arm caught therein, the fact that negligence of such third person concurred with defendant's negligence to produce the injury would not relieve the defendant of liability; nor can defendant escape liability if the act of the third person was not a negligent one.
4. A reference by the trial judge in his charge in such case to the "viewing stand which caused the injury," did not take from the jury the question of proximate cause, and, in the light of the remainder of the charge, the jury could not so have understood it. The error, if any, was therefore not prejudicial.

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Appeal from a judgment of the circuit court for La Crosse county: E. C. Higbee, Circuit Judge. *Affirmed.*

The plaintiff brings this action to recover damages for an injury received by reason of his arm having been caught between a pulley attached to the cylinder shaft of a threshing machine and a belt running from such pulley to operate a self-feeding device attached to the machine. The machine was on exhibition at a county fair held at La Crosse in September, 1912. Its front end faced east and on its south side a viewing platform was erected which was fourteen feet long, thirty inches wide, and four feet and four inches above the ground. There was a railing around this platform about two feet high. At the east end of the platform there were four steps leading to it which had no railing. The pulley on the cylinder shaft where the injury occurred was five feet five inches from the ground, and the platform was thirteen inches below the center of this pulley. There were three pulleys on this shaft on the side where the injury occurred, and plaintiff was caught on the one closest to the machine and farthest from the platform. The belt was four feet long and four inches wide and ran upward at an angle of about forty-five degrees, as claimed by the defendant, and at a lesser angle according to the claim of the plaintiff. The upper pulley on which this belt ran is claimed to be seven feet eleven inches from the ground. The platform was about two feet south of the separator. It was claimed by the defendant that the railing of the platform extended from fourteen to eighteen inches east of the cylinder pulley in which the plaintiff was caught. It is claimed by the plaintiff that the railing did not extend far enough east to be in line with the cylinder shaft.

Plaintiff with two others went up on the viewing platform to observe the machine in operation. Plaintiff testified that one of his companions first went down the steps and he and the other companion were going down together when some one stepped between them and jogged the plaintiff with his shoul-

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der so that plaintiff fell over and got his arm caught between the belt and the pulley, and that he was on the second step and stepping onto the third when this occurred. There was testimony tending to show that the hat of the man who jostled the plaintiff had blown off and that the jostling was the result of his making a quick grab for his hat. The negligence relied on was the failure of the defendant to place a railing on the side of the steps nearest to the machine.

The jury returned a general verdict assessing plaintiff's damages at $3,500. These damages the court deemed excessive and gave the plaintiff an option to take judgment for $2,000 or a new trial. Judgment was entered for $2,000 and costs in favor of the plaintiff and against the defendant, from which judgment defendant appeals.

For the appellant there was a brief by *Baldwin & Bosshard,* attorneys, and *Bagley & Reed,* of counsel, and oral argument by *C. L. Baldwin* and *W. R. Bagley.*

F. E. Withrow, for the respondent.

Barnes, J. The appellant argues that a verdict should have been directed (1) because the failure to provide a railing for the steps had nothing whatever to do with the plaintiff's injury, and (2) because the jostling or pushing of the plaintiff was the proximate cause of the injury and defendant was in no sense responsible for it. Failing in these contentions, defendant insists that it is entitled to a new trial because the court erred in charging the jury.

1. Three witnesses testified that they saw the plaintiff while his arm was wedged between the belt and the pulley and that his feet were on the platform and his side was resting against the platform railing. It is claimed that this evidence shows that plaintiff was not on the steps when he got caught, and the presence or absence of a railing thereon was wholly immaterial. The trouble with this claim is that there is plenty of evidence tending to show that plaintiff was on the

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steps when he fell to warrant the jury in so finding. It is argued that, while perhaps it is not impossible that the plaintiff might get caught if he stood where he claimed he did, it is highly improbable that he could, because of the distance he would be away from the belt. An extended analysis of the measurements would serve no useful purpose. When plaintiff found himself falling, his natural impulse would be to throw out his arm in the direction of the fall, and we see nothing improbable in his story. Indeed we think it would be fully as improbable that he could be caught if he had been standing on the platform as it is that he could be caught if located where he testified he was. There was a photograph offered which tended to show that the platform did not extend east beyond the cylinder shaft. This shaft was only thirteen inches above the platform, and the plaintiff, according to his statement, was from twenty to thirty inches below the platform when he was caught. The separator was but two feet from the platform. There is a dispute as to the angle at which the belt ran. But if we adopt the defendant's theory it would be difficult to say that the plaintiff, who was descending on the side of the steps closest to the machine and who was five feet six inches tall, would not throw out his arm when in the act of falling, so as to get caught in the belt.

2. The next question argued is that the pushing of the plaintiff by a third person was the proximate cause of the injury, and hence there can be no recovery. The following cases are cited in support of the proposition advanced: *McFarlane v. Sullivan,* 99 Wis. 361, 74 N. W. 559, 75 N. W. 71; *Lippert v. Joseph Schlitz B. Co.* 141 Wis. 453, 124 N. W. 491; *Barton v. Pepin Co. Agr. Soc.* 83 Wis. 19, 52 N. W. 1129; *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342, 11 N. W. 356, 911. Another case dealing with independent intervening causes is *Cook v. M., St. P. & S. S. M. R. Co.* 98 Wis. 624, 636, 74 N. W. 561.

The jury might well find that the presence of a suitable

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railing would have prevented the injury and that the absence of such a railing was a responsible cause for it. The man who jostled the plaintiff may or may not have been negligent. If he was, then we have two independent causes which joined to produce the injury. Under these circumstances both wrongdoers are liable and recovery may be had against either. It is so held in the following cases: *Atkinson v. Goodrich T. Co.* 60 Wis. 141, 18 N. W. 764; *Haley v. Jump River L. Co.* 81 Wis. 412, 51 N. W. 321, 956; *Olson v. Phœnix Mfg. Co.* 103 Wis. 337, 79 N. W. 409; *Sherman v. Menominee River L. Co.* 72 Wis. 122, 39 N. W. 365; *McClure v. Sparta,* 84 Wis. 269, 54 N. W. 337; and a large number of other cases which will be found cited in *Mehegan v. Faber,* 158 Wis. 645, 149 N. W. 397.

If the defendant would be liable although the act of the party who pushed the plaintiff was a negligent one, then we do not see how it can escape liability if such act was not a negligent one. Practically the same situation was before the court in *Tolleman v. Sheboygan L., P. & R. Co.* 148 Wis. 197, 134 N. W. 406, where the defendant was held liable. In principle the case does not differ from *Jackson v. Wis. T. Co.* 88 Wis. 243, 60 N. W. 430, where the defendant was likewise held liable. It is well known that county fairs attract crowds and that it is for this reason articles are placed on exhibition. The attention of the crowd is directed more towards objects which arouse their curiosity than it ordinarily is to their own safety or the safety of others. People crowd and jostle their neighbors. It was in anticipation of something of this kind that a railing was built around the platform, and also perhaps to prevent persons from thoughtlessly stepping off from it. In other words, it was anticipated that injury might happen to someone if a railing were not erected. There was just as much reason for placing a railing on either side of the steps and fully as much reason to anticipate that injury might result to some one if no railing were provided.

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It was not necessary that defendant should anticipate that this particular accident might happen or that any accident might happen in the precise manner in which this one did. If the defendant should reasonably have anticipated that injury might probably result to some person exercising ordinary care if guard rails were not provided, then it was negligent in failing to provide them, and a person injured without fault on his part would have a cause of action. *Coolidge v. Hallauer,* 126 Wis. 244, 250, 105 N. W. 568; *Meyer v. Milwaukee E. R. & L. Co.* 116 Wis. 336, 93 N. W. 6.

3. No exception was taken to the charge of the court, but it is urged that there was prejudicial error in it and that the court should in the interest of justice review it under sec. 2405*m,* Stats.

Two paragraphs of the charge are criticised. One of them is obviously correct; the other is as follows:

"So you see that the questions which are for your determination are quite simple, for if the plaintiff has satisfied you by a fair preponderance of the evidence that the defendant was wanting in the exercise of such care and prudence as ordinarily careful and prudent persons ordinarily exercise under the same or similar circumstances in the erection and maintenance of its viewing stand which caused the injury, and that in the light of attending circumstances the defendant as an ordinarily careful and prudent person ought reasonably to have foreseen that personal injury to another might probably result from such want of care, then plaintiff is entitled to recover at your hands."

The criticism on this charge is that, by stating that the viewing stand *"caused the injury,"* the trial judge took from the jury the question of proximate cause and decided it himself.

The claim is far fetched. The court was not charging the jury on the question of proximate cause, but on what would constitute negligence on the part of the defendant. Where a

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man's hand is injured in a machine it is common to refer to it as the machine which caused the injury, without at all implying that there was any fault or negligence on the part of the owner of it. The stand did cause the injury in the sense that it would not have been suffered had there been no stand, and it is highly improbable that the jury understood the words in any other light. There was very little to go to the jury on the question of proximate cause, except the element of reasonable anticipation, and the jury was carefully instructed that recovery could not be had unless the defendant ought reasonably to have foreseen that injury might result from its alleged negligent act. There was at least no prejudicial error in the instruction.

By the Court.—Judgment affirmed.

STATE EX REL. MAUGHAN, Appellant, vs. BOERNER, Town Clerk, Respondent.

November 21—December 8, 1914.

Highways: Laying out: Proof of service of notice: Award of damages: Approval by electors, when not necessary.

1. No formal return of service of the notice of a meeting of the town supervisors to decide upon an application for laying out a highway being required, where there is proof by affidavit that the affiant "personally served" the notice upon the occupants of the land affected, and the order thereafter made laying out the highway recites that the supervisors were first satisfied by due proof that the required notice had been duly given, due service is, under secs. 1268, 1298, Stats., sufficiently proved, and in order to impeach the record failure of service must affirmatively appear.
2. Under sub. 2, sec. 1291, Stats., approval of the award of damages and acceptance of the highway by the electors of the town is not necessary, although the award exceeds $500, unless it also exceeds one tenth of one per cent. on the taxable property of the town.

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APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *S. H. Taylor,* and for the respondent on that of *Meyer & Burgess.*

KERWIN, J. This is an appeal from a judgment of the circuit court for Grant county affirming the action of the board of supervisors of the town of Liberty in said county laying out a highway. The matter came before the court below on writ of *certiorari* to the board of supervisors of the town. The board made an order laying out the highway in question.

Two points are made for reversal: (1) It is contended that there was not sufficient proof that the notice of the meeting of the board of supervisors to decide upon the application to lay out the highway was given to the occupants of the lands through which the highway was to be laid out. (2) That the order and award of damages were not submitted to, nor approved, nor such highway accepted by the electors of the town at the annual town meeting or at any special meeting, although the damages allowed by the supervisors exceeded the sum of $500, the sum awarded being $1,150.

1. On the first point it is argued that the proof of service was not sufficient. It is as follows:

"Henry Jackering, being first duly sworn, on oath says that on the 22d day of October, 1913, he personally served the within notice upon the following named persons, the occupants of the lands the description whereof is set opposite their respective names."

Following this are the names of the landowners, including that of the appellant.

Sec. 1267, Stats., provides for the service of the notice, and states that it shall be served personally or by copy left with or at the usual place of abode of such occupant and such

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notice shall also be posted in three public places in the town ten days before the time of such meeting. It is plain that the same particularity is not required in the service of this notice as in the service of process for the commencement of an action. *Green v. State,* 56 Wis. 583, 14 N. W. 620; *State ex rel. Iola v. Nelson,* 57 Wis. 147, 15 N. W. 14. No provision is made in the statute for any formal return of service. So it would seem that the affidavit to the effect that the affiant personally served the notice was sufficient *prima facie.* Reasonable inference from the affidavit is that the landowners were given actual notice of the proceedings. *State ex rel. Iola v. Nelson, supra.* Moreover sec. 1268, Stats., provides that the supervisors, "upon being satisfied that the notices required in the preceding section have been duly given, proof of which may be shown by affidavit or otherwise as they may require, shall proceed to examine personally such highway . . . and shall decide upon the application as they shall deem proper. . . ." In the instant case the supervisors passed upon the notice and were satisfied, as the record shows, that notice had been duly given. It will be observed that proof may be made to the supervisors "by affidavit or otherwise." It must be presumed, therefore, upon the record made that due notice was given. Sec. 1298, Stats., makes the order of the supervisors, or supervisors and commissioners, laying out the highway, and the order of any commissioners reversing or affirming the same on appeal, and the record or a certified copy thereof, presumptive evidence of the facts therein stated and of the regularity of the proceedings prior to the making of such order. So upon the facts stated service appears to have been made, and in order to impeach the record failure of service must affirmatively appear. *Schillock v. Jones,* 147 Wis. 119, 132 N. W. 908; *State ex rel. Jenkins v. Harland,* 74 Wis. 11, 41 N. W. 1060; *State ex rel. Ronglien v. Clemenson,* 148 Wis. 268, 134 N. W. 403.

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2. The second point made is without merit. Sub. 2 of sec. 1291, Stats., reads:

"But when the total amount of damages chargeable to one town, consequent upon any one order for laying out, widening or altering a highway, shall be more than one tenth of one per cent. on the taxable property of the town, as shown by the last assessment, and shall also exceed the sum of five hundred dollars, such highway shall not be opened, widened or altered nor liability for damages exist, unless such order and the award or damages be approved, and such highway be accepted by a majority of the qualified electors of the town liable to such damages voting thereon at the next annual town meeting or some special town meeting sooner called therefor."

It is clear from this statute that it is only in cases where the damages awarded exceed in amount one tenth of one per cent. on the taxable property of the town and also exceed the sum of $500 that approval by the electors is necessary. In the instant case it appears that the amount of damages does not exceed one tenth of one per cent. on the taxable property of the town, hence approval by the electors was not necessary, although the damages exceeded $500. It follows, therefore, that the judgment below is right and must be affirmed.

By the Court.—Judgment is affirmed.

McLAIN, Plaintiff in error, vs. THE STATE, Defendant in error.

November 21—December 8, 1914.

Rape: Evidence: Sufficiency: "Utmost resistance."

1. To constitute rape there must be an entire absence of consent, and there must be the utmost resistance by the woman by all means within her power.
2. "Utmost resistance" is a relative term; and what would constitute such resistance on the part of a weak, nervous, and timid person might be the veriest sham on the part of a healthy, robust, and courageous person.
3. The evidence in this case as to nonconsent and resistance is *held* sufficient to sustain a conviction of rape.

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ERROR to review a judgment of the circuit court for Forest county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

For the plaintiff in error there was a brief by *Dillon & Tomkins,* and oral argument by *A. Pearce Tomkins.*

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *John F. Hooper.*

WINSLOW, C. J. The plaintiff in error (hereinafter called the defendant) was convicted of rape, and brings error to reverse the judgment. Some claims are made of error in the rulings on evidence, but they are clearly untenable and we do not deem it necessary to specifically treat them. The claim that the evidence is not sufficient to sustain a conviction for rape will be briefly treated.

The evidence shows without dispute that the prosecutrix and the defendant were acquaintances for about ten years and were about twenty and twenty-two years of age respectively, and resided at the village of Fence in Forest county, Wisconsin; that they met accidentally at the railroad station at Armstrong in said county in the early morning of April 18, 1911, the station being about eight miles from Fence; that defendant had a horse and buckboard buggy and offered the prosecutrix a ride with him to Fence, which she accepted; that the country between the two places is thickly wooded and unsettled, there being but one farm house on the road; that after driving about five miles the defendant stopped the horse and got out of the buggy. At this point the stories of the two participants radically disagree. The prosecutrix testifies in substance that the defendant took her forcibly from the buggy, threw her on the ground, and had sexual intercourse with her, notwithstanding the fact that she made every effort in her power to resist the attack. The defendant, on the other hand, testifies that they talked the matter over and that the prosecutrix voluntarily consented to the intercourse. After the act was consummated the parties got in the buggy and

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proceeded to Fence, where the prosecutrix was left at her own home at about 12 o'clock. She has no mother, and after dinner she went to her aunt's house (a walk of about ten minutes), where a ladies' society was having a meeting. After the meeting she walked home with a girl friend, to whom she first told the story. The friend told her mother, and this prosecution was commenced on the following day.

It is undoubtedly true, as claimed by the defendant, that in order to constitute the crime of rape there must not only be the entire absence of consent, but there must be the utmost resistance by the woman by all means within her power. *Brown v. State,* 127 Wis. 193, 106 N. W. 536. It is said that such resistance is not proven in this case. The court is of opinion, after careful consideration of the evidence, that this contention must be overruled.

The offense here was committed on a lonely road in the woods, at a place where no outcry could reach the ears of any one. The prosecuting witness testifies that the defendant took her forcibly from the buggy, though she cried, took hold of the wheels, and resisted with all her strength; that she was having her menstrual flow at the time and was weak and nervous; that he threw her down on the ground, holding both her arms under her shoulder with his right arm, and then accomplished his purpose, although she fought, pleaded, and cried, and tried to protect herself from outrage to the utmost of her strength. It is undisputed that her drawers were torn down on the right side and that the defendant did it. There is also some corroborating testimony by one witness to the effect that she observed red marks on the wrists and arms of the prosecutrix on the night of the offense.

It must be remembered that the term "utmost resistance" is a relative rather than a positive term. What would be "utmost resistance" on the part of a weak and nervous person, with a temperament easily frightened, might be the veriest sham on the part of a robust person in good health, whose nerves and courage are normal.

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The jury and the trial judge had the advantage of seeing both parties upon the witness stand; and the jury has said under proper instructions that there was the utmost resistance on the part of the prosecutrix. The trial judge not only refused to set aside this verdict, but expressed himself as satisfied that the defendant had been justly convicted.

Under the circumstances this court does not consider that it should disturb the verdict.

By the Court.—Judgment affirmed.

SIEBECKER, J., dissents.

HIRSCHBERG, Appellant, vs. BACHER, Respondent.

October 28—November 17, 1914.

Partnership: Agreement construed: Termination: Good will as asset: Accounting: Evidence as to disbursements: Monthly statements.

1. Under a copartnership agreement reciting that defendant was engaged in soliciting insurance and adjusting claims and that he was conducting such business in connection with the firm of A. & Son, general insurance agents, and providing that in consideration of certain payments to be made by plaintiff defendant assigned to him a one-third interest in said business and in the net income thereof, the partnership to continue for five years, the transfer to plaintiff did not include any element of value in the nature of good will; and at the termination of the partnership plaintiff was not entitled to recover from defendant any amount for good will as an asset of the business.
2. Such partnership agreement provided that defendant should be "the head and manager of the business," and that all questions concerning the business should, in case of disagreement, be settled and determined by him; also that the books should be closed on January 1st in each year and the profits, if any, be then divided. The account of the income and disbursements of the business was kept in the books of A. & Son, entries of expense therein being made as given to the bookkeeper by defendant. He also

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gave plaintiff monthly statements of the earnings, to which plaintiff made no objection until the termination of the partnership. *Held*, that the books of account and the monthly statements were competent and established *prima facie* the items involved in the accounting between the partners.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

This is an action to recover moneys the plaintiff claims are due him under a contract with the defendant to conduct an insurance business in the city of Milwaukee. The cause was tried to the court and judgment awarded for the plaintiff in the sum of $1,789.60 with interest thereon at six per cent. per annum from June 20, 1911.

The defendant *Bacher* was an insurance solicitor in the city of Milwaukee on and prior to September 1, 1905. His business consisted in soliciting insurance and the adjusting of claims. The business conducted by him was in the name of Louis Auer & Son, which firm was conducting a general insurance business, and at the time here involved was the general agent for the Frankfort General Insurance Company. The plaintiff and *Bacher* entered into the following agreement on the 1st of September, 1905:

"Agreement of copartnership, entered into this first day of September, 1905, by and between *Julius Bacher* of the city of Milwaukee, county of Milwaukee and state of Wisconsin, party of the first part, and *Joseph G. Hirschberg* of the same place, party of the second part.

"Whereas, said party of the first part is now engaged in the business of soliciting employers' liability, accident, fire and other insurance in the state of Wisconsin and elsewhere, and also in adjusting and settling claims under employers' liability and accident insurance policies; and

"Whereas, said party of the first part is desirous of obtaining a partner in his said business, which he conducts in connection with Louis Auer & Son in said city of Milwaukee, and said party of the second part is desirous of becoming such partner;

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"It is agreed that said party of the second part shall pay to said party of the first part the sum of three thousand and no/100 ($3,000) dollars upon the date hereof, and the said party of the first part is to receive from and out of said second party's share of the profits of said business, as herein fixed, the additional sum of three thousand dollars as follows: one thousand and no/100 ($1,000) dollars upon the first days of September, 1906, 1907, and 1908, for and in consideration of which said party of the first part agrees to assign, and hereby does assign, to said party of the second part a one-third (⅓) interest in said business and in the net income thereof; and it is further agreed that out of the gross receipts of said business all expenses shall first be paid, including all sums due to said Louis Auer & Son, pursuant to the agreements made, and to be made from time to time, between said Louis Auer & Son and said first party hereto, which said sum so paid to Louis Auer & Son shall in no event exceed one quarter (¼) of the net receipts of the partnership hereby created, after payment of all other expenses.

"It is further agreed that should the party of the second part secure new business so as to increase the income of said partnership by the sum of five hundred ($500) dollars or more per year, in excess of the increase in income secured by said first party in the same year, then said party of the second part is to receive fifty (50) per cent. of said additional income secured by him in excess of the increase secured by said first party, instead of one third (⅓).

"It is further agreed that said party of the second part is to have the right to draw out of his share of the profits of said business no more than the sum of one hundred and no/100 ($100) dollars per month until said first party has received full payment of all sums agreed by this contract to be paid to him.

"It is further agreed that each party shall devote his entire working time, attention, talents and business capacity to said business hereby agreed to be carried on by them as copartners, it being understood that any business done by either party outside of the state of Wisconsin shall be subject in all respects to the terms of this agreement.

"It is further agreed that the books shall be closed on the first day of January in each year, and the profits, if any, at

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once divided between said partners in accordance with the terms of this contract.

"It is further agreed that said partnership shall continue for five years (5) from the date hereof, and that said first party shall be the head and manager of the business, and all questions concerning such business shall, in case of disagreement between said partners, be settled and determined by said first party.

"Witness the hands and seals of said parties the day and year first above written.

"In presence of

"Ed. Porth. JULIUS BACHER (Seal).

"W. Porth, Jr. JOSEPH G. HIRSCHBERG (Seal)."

The plaintiff performed the conditions of the contract. The defendant notified the plaintiff that the partnership created thereby would not be continued after the expiration of the contract. At the expiration of the contract the plaintiff withdrew from any participation in the business.

The circuit court held that under the provisions of the partnership agreement the plaintiff had no right to recover for any good will as an asset of the business and that he was entitled to receive one third of the joint net earnings of plaintiff and defendant, realized from the business conducted by them, from September 1, 1905, to September 1, 1910. Upon this ruling the court awarded judgment to the plaintiff for $1,789.60, the amount found due him under the contract, with interest at six per cent. per annum from June 20, 1911. From this judgment the plaintiff appeals.

For the appellant there were briefs by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley* and *Mr. W. B. Rubin.*

For the respondent there was a brief by *Doe, Ballhorn & Wilkie,* and oral argument by *J. B. Doe.*

SIEBECKER, J. The plaintiff contends that the trial court erred in finding there was due him under the contract the

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sum of $1,789.60. It is urged that the court below committed error in refusing to allow the plaintiff recovery of the value of good will as an asset of the partnership business appropriated by the defendant, and that the court erred in allowing charges of expense to be deducted from the income of the partnership business which were not supported by evidence, and thus deprived the plaintiff from recovering his full share of the net income of the partnership business. These claims of the plaintiff require interpretation of the contract of the parties, designated a copartnership agreement. It appears from the context of this agreement that the defendant *Bacher* was, prior to and at the time this agreement was made, engaged in the business of soliciting liability insurance and was conducting this business in connection with the firm of Louis Auer & Son, who were doing a general insurance business in the city of Milwaukee. The contract provides that out of the gross receipts of the business transacted "all expenses shall first be paid, including all sums due to said Louis Auer & Son, pursuant to the agreement made, and to be made from time to time between said Louis Auer & Son and said first party hereto, which said sum so paid to Louis Auer & Son shall in no event exceed one quarter ($\frac{1}{4}$) of the net receipts of the partnership hereby created, after payment of all other expenses." It was also agreed that the plaintiff was to pay the defendant $3,000 on the day the contract was made and an additional $3,000 out of his profits on September 1, 1906, 1907, and 1908. In consideration of these payments to the defendant he assigned to the plaintiff "a one-third ($\frac{1}{3}$) interest in said business and in the net income thereof." The partnership was to continue five years from the date of the contract, September 1, 1905. The stipulations of the contract and the recitals therein clearly contemplate that the business to be transacted by the partnership was principally that which the defendant *Bacher* secured the right to do by his connection with the firm of Louis Auer &

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Son. The business transacted during the contract period was almost entirely under contract by defendant with this firm. It appears that the defendant had been engaged as soliciting agent for years under like arrangements with said firm and that there were a large number of policies in force at the time the plaintiff joined him in the business. It is urged that the down payment by the plaintiff of the $3,000 and an additional $3,000 out of his share of the earnings was a purchase by him of an interest which included an element of good will in defendant's business. The nature of the business and the terms of the contract tend to negative this claim. Defendant's business cannot be likened to an established commercial plant. Its advantages to plaintiff in associating himself therewith consisted in becoming acquainted with defendant's patrons, in sharing in the profits of the commissions that would naturally come to the firm through renewals of contracts with such patrons, and the proceeds of defendant's success as a soliciting insurance agent in connection with Louis Auer & Son. Under the circumstances and condition of this business it is apparent that the terms of the contract assigning to the plaintiff a "one-third ($\frac{1}{3}$) interest in the said business and the net income thereof," granted to plaintiff an interest in the earnings thereof for the contract period. We find nothing in the agreement, when applied to the situation of the parties, to indicate that they contemplated that the transfer of an interest in the business and the income thereof was to include an element of value in the nature of good will. We are of the opinion that the trial court properly held that the contract gave plaintiff a right to a one-third interest in their joint net earnings realized from the business during the contract period.

The question remains, Did the court find the correct amount due plaintiff out of the net proceeds of the business under the contract? The plaintiff contends that he has not been awarded recovery of the full amount due him, and bases this

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contention on the ground that he has shown the gross amount of commissions and fees earned by them during the five years covered by the contract, and that defendant, who had charge of the disbursements, has failed to prove an amount thereof which reduces the gross earnings to the net amount found by the court. The account of the income and disbursements of the business was kept in the books of Louis Auer & Son. This is not disputed. According to the entries of these books the court allowed the plaintiff recovery for the correct amount due him. It however is urged that this basis of settling the partnership affairs is not proper, and that the book entries cannot control because the defendant failed to show that the disbursements as itemized in such book accounts are correct and proper deductions. The bookkeeper testified that she made the entries of expense therein as they were given to her by *Mr. Bacher*. It also appears that *Bacher* gave the plaintiff a monthly statement of their earnings, and that they were not objected to by the plaintiff as incorrect. The contract provides that the books shall be closed on the 1st day of January in each year, and that the profits, if any, be then divided. The contract furthermore provides that *Bacher* "shall be the head and manager of the business, and all questions concerning such business shall, in case of disagreement between such parties, be settled and determined by said first party" (*Bacher*). Under these terms of the contract *Bacher* clearly had the management of the business concerning the charges and disbursements and was authorized to direct the entry of the charges in the books of account. When he submitted monthly statements to plaintiff of the net earnings, it devolved upon the plaintiff to object thereto if he did not accept them as correct. This he never did until the five years of the contract had run. It is apparent that the plaintiff accepted the defendant's statement of the business expenses as correct until the contract period was about to expire. Under these circumstances and under the terms and conditions of

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the contract for conducting the partnership affairs, the evidence of the monthly statements, the books of accounts, and the testimony of the bookkeeper that the items of expenditure deducted from the gross earnings were proper and correct as they appeared therein, *prima facie* established the items involved in the accounting. The facts and circumstances were competent proof on the subject and warranted the trial court in concluding that the items *Bacher* reported and directed to be charged as expenses should be deducted from the gross earnings. The court properly allowed them and awarded plaintiff a judgment for the balance due him on the amounts collected and paid before September 1, 1910, and for the amount earned before but collected after that date.

By the Court.—Judgment affirmed.

ILLINOIS STEEL COMPANY, Appellant, vs. ROGALL and others, Respondents.

October 30—November 17, 1914.

Ejectment: Abatement of action: Death of defendant: Bringing in real parties in interest.

1. An action of ejectment abates on the death of the sole defendant and occupant of the premises, and cannot be revived against his heirs or personal representatives claiming only as such.
2. Where a defendant in ejectment transfers his interest and the possession of the land, he becomes a mere nominal party and the transferees become the real parties in interest, liable to be made defendants at any time under sec. 2801, Stats.; and the right to have such real parties in interest made defendants is not impaired by death of the nominal party.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed in part; reversed in part.*

Ejectment. The plaintiff appeals from an order denying

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an application to revive the action. It appeared from the moving papers that the action was commenced in 1896 against Martin Warras and Mary Warras, his wife, who were then occupying the premises in dispute; that they both died at some time shortly prior to February, 1911, the said Martin Warras being intestate; that they left eight children surviving them who claim an interest in said property as heirs at law of Martin Warras; that *Joseph Rogall* and *Mary Rogall,* his wife, are in actual possession of the premises, claiming an interest therein as successors in interest of Martin and Mary Warras. On these facts the plaintiff moved to revive the action against the *Rogalls* and the eight heirs at law of Martin Warras. It further appeared by an affidavit filed on behalf of the defendants that the original defendant, Martin Warras, survived his wife, Mary, and, prior to his own death, transferred his interest in the property in question to one Mary Rogall, who in turn transferred the same to the said *Joseph Rogall* and *Mary Rogall,* and that said *Rogalls* are in possession claiming to be the owners thereof.

For the appellant there was a brief by *Theodore Kronshage, Jr., John H. Paul,* and *John W. McMillan,* and oral argument by *Mr. McMillan.*

For the adult respondents there was a brief by *Fiebing & Killilea, H. J. Killilea,* and *Moritz Wittig,* and oral argument by *Mr. Wittig.*

For the infant respondents the cause was submitted on the brief of *Otto Dorner,* guardian *ad litem.*

WINSLOW, C. J. In this case it is held:

1. The action of ejectment does not survive the death of the sole defendant and occupant of the premises (*Farrall v. Shea,* 66 Wis. 561, 29 N. W. 634), hence it cannot be revived against heirs at law or personal representatives claiming only as such. The motion, therefore, was properly denied so far as the heirs at law of Martin Warras are concerned.

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2. As soon as Martin Warras in his lifetime transferred his interest to the *Rogalls* and they took possession Warras became a mere nominal party and the *Rogalls* became the real parties in interest liable to be made defendants at any time, under sec. 2801, Stats. Manifestly the death of a mere nominal party could not impair the plaintiff's right to have the real parties in interest made defendants. Therefore the court should have ordered the *Rogalls* to be brought in as defendants and the action to continue as to them.

By the Court.—That portion of the order refusing to revive the action as to the heirs at law of Martin Warras and Mary Rogall (mother of *Joseph Rogall*) is affirmed with $25 costs, and the remainder of the order is reversed and the action remanded with directions to enter an order bringing in *Joseph Rogall* and *Mary,* his wife, as defendants, and continuing the action as to them. Plaintiff to recover against the *Rogalls* last named the fees of the clerk of this court.[1]

STATE EX REL. HUSTING VS. BOARD OF STATE CANVASSERS and others.

December 9—December 11, 1914.

Elections: Returns: Canvass: Time for completion not affected by recount proceedings: Construction of statutes: Constitutional law: Mandamus.

1. It is the duty of the court to firmly maintain its own function, but not trespass upon that of the legislature. The former requires solution of doubts respecting legislative purpose intended to be embodied in an enactment and the pronounced result becomes, in effect, written into such enactment.
2. If by judicial construction a legislative enactment embodies a purpose which is unconstitutional it must be condemned.

[1] The mandate of this court in *Illinois Steel Co. v. Rogall* was amended so as to read as above, on February 9, 1915.—REP.

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3. If part of an enactment is unconstitutional and the remainder is not, and is reasonably complete by itself, and the former was not such inducement to the entirety but what the latter might, within reasonable probability, have been enacted by itself, to that extent it should be approved and otherwise disapproved.

4. If a legislative enactment is so uncertain that the court cannot determine with any reasonable degree of certainty, what its purpose was, or if it be so incomplete that it cannot be executed, it must be condemned as void.

5. In construing an ambiguous legislative enactment some established rules are to be observed as unwritten law with all the force of written law, and among them:

(a) No attempt to read a legislative enactment different from its plain words and evident meaning on its face is legitimate, if so read it "leads to no absurd consequences."

(b) There should be real uncertainty of meaning found in a legislative enactment before resorting to reading it by aid of rules for judicial construction.

(c) Whether the meaning of words of an enactment are plain is to be determined with reference to the connections in which they are used, the subject dealt with, the circumstances at the time, and the object in view.

(d) The term "and leads to no absurd consequences" requires the rule that ambiguity requiring judicial construction may as well arise from applying the literal sense of words to the subject dealt with as from uncertainty of the words themselves.

(e) An intent, however apparent, which cannot reasonably be read out of a legislative enactment, should not be adopted, but an intent, however absurd, which can be so read and shows clearly the legislative purpose beyond reasonable doubt, must be adopted regardless of the effect upon validity.

(f) The very letter of an enactment may be violated to carry out a manifest legislative intent, so long as it can be found expressed within the reasonable scope of the language used.

(g) Where there is irreconcilable conflict between a legislative enactment and an earlier law, a presumption arises of a purpose to modify or repeal the latter; but that is rebuttable by circumstances and, among them, that the existing law constitutes an entire system and the later enactment would render the entirety unconstitutional or absurd.

6. Under sec. 1, art. XIII, of the state constitution, the political year of the state commences on the first Monday of January of such year and all constitutional officers elected at the November election in any year are required to be circumstanced to take up their respective offices at such time.

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7. The legislative plan for accomplishing the requirement mentioned in the last foregoing paragraph, as embodied in ch. 5, Stats., undisturbed by ch. 328, Laws of 1911, inserted in said chapter at sec. 86, does not admit of any change which would, or might probably prevent such accomplishment.
8. Such legislative plan contemplates a fixed limit of time for a county clerk to complete the canvass of election district returns, to decide upon the result, to issue certificates of election to county officers found elected, and to make returns of the result of the election as to state officers to the secretary of state.
9. The statute requires the entire result of the county canvass to be covered by a single decision and the result, as to the state officers, to be included in a single return.
10. The duty of the county canvassing board, independently of the law of 1911, is purely ministerial; it is required to obtain possession of the district returns within the time specified; it may have a remedy by *mandamus* to enable it to do so, if necessary, and may be compelled by *mandamus*, if necessary, to complete its work within the required time.
11. The statute requires the secretary of state and state canvassing board to obtain possession of the county results by the time fixed by statute for commencement of continuous work of making the state canvass, to complete it, file the decision and issue certificates of election in the time limited by statute.
12. Sec. 86, Stats. 1913, cannot be restrained so as to affect some officers and not others; it includes all so plainly as to preclude any different meaning being adopted by construction.
13. Sec. 86, Stats. 1913, cannot be given such effect as to prevent making the county canvasses and state canvass within the time required by law, as that would be liable to prevent newly elected officers from taking their respective offices on the first Monday of the political year.
14. If the legislative purpose was as indicated in sec. 86 in its letter so far as it, if executed, would prevent a county canvass and the state canvass from being completed within the time fixed by statute, it is unconstitutional.
15. If the legislature did not intend the law of 1911 to be restrained so as not to impair the efficiency of the existing law, the purpose is too much involved in obscurity to be discoverable with the reasonable degree of certainty essential to effect being given thereto.
16. No effect can be given to a legislative enactment, however broad its provisions, further than to harmonize it with existing law which is necessary to a constitutional requirement, and if a law

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be held to have been intended otherwise the court must declare it void for uncertainty or unconstitutionality.

17. The statute requiring the state canvassing board to complete its work within a specified time is directory, to the extent that it may continue to a finality after expiration of the time, but it has no discretion to delay by adjournments or for anything but proceedings to compel transmission of the county returns, and, in case of delays otherwise, it may be coerced by the *mandamus* remedy.

18. Under sec. 94*e*, Stats. 1913, the state board of canvassers must make its decision from the county returns mentioned in sub. 1, sec. 87, and from such returns only. The statute contemplates but one return and that to be an entirety.

[Syllabus by MARSHALL, J.]

BARNES, J., and WINSLOW, C. J., dissent.

THIS was a *mandamus* action instituted by an alleged successful candidate, at the November election, 1914, for the office of United States senator for Wisconsin, to compel certain boards of county canvassers to complete the canvass of original returns from the several election precincts in their respective counties without waiting upon the result of recount proceedings under sec. 86 of the Statutes, and to deliver the duly certified results to their respective county clerks; and to compel such county clerks to, thereupon, transmit such certified results, in due form, to the secretary of state as required by statute; and to compel the *State Board of Canvassers* and secretary of state to perform their duties as to acquiring possession of such certified results, and such *State Board of Canvassers* to proceed, diligently, to canvass such returns and complete the duties prescribed by secs. 94 to 94*e*, Stats., inclusive, as therein prescribed, without waiting upon termination of proceedings under said sec. 86, Stats.

Such proceedings were duly had in the action that, as to each of the defendants, the question was raised of whether a county board of canvassers, under sec. 81, Stats., and the *State Board of Canvassers*, under sec. 93, Stats., are required to perform their respective duties without awaiting the re-

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sult of proceedings under said sec. 86, Stats. If the affirmative should prevail peremptory writs of *mandamus* should issue as prayed for.

For the relator there was a brief by *John A. Aylward, M. B. Olbrich,* and *W. H. Timlin, Jr.,* and a separate brief by *Timlin, Dean & Nebel* and *W. H. Timlin, Jr.,* and the cause was argued orally by *Mr. Olbrich, Mr. Aylward,* and *Mr. Timlin.* They argued, among other things, that the recount statute in question has no application to a recount of the ballots cast for United States senator. Sec. 86, Stats. 1913, had its origin in sec. 234*a*, How. Ann. Stats. Mich. Supp. 1883–1890. Having been taken from Michigan, its construction was taken with it and became a part of the law of this state. *State v. Pabst,* 139 Wis. 561, 121 N. W. 351; *State v. Bullen,* 143 Wis. 512, 128 N. W. 109; *Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 312, 139 N. W. 179; *Kranz v. Wis. T. Co.* 155 Wis. 40, 44, 143 N. W. 1049; *Manitowoc C. P. Co. v. M., G. B. & N. W. R. Co.* 135 Wis. 94, 102, 115 N. W. 390. It had received in Michigan a construction which expressly excluded its application to a representative or senator in Congress. *Belknap v. Board of Canvassers,* 94 Mich. 516, 54 N. W. 376. See, also, *Weston v. Probate Judge,* 69 Mich. 600, 37 N. W. 698; *Naumann v. Board of City Canvassers,* 73 Mich. 252, 41 N. W. 267; *Wheeler v. Board of Canvassers,* 94 Mich. 448, 53 N. W. 914; *Vance v. Board of Canvassers,* 95 Mich. 462, 54 N. W. 1084. The delays possible under the statute demonstrate that it has no application to United States senator. *State ex rel. Kustermann v. Board of State Canvassers,* 145 Wis. 294, 307, 315, 130 N. W. 489; *State ex rel. Kletzsch v. Widule,* 158 Wis. 387, 149 N. W. 212; McCrary, Elections (4th ed.) § 302. To apply the statute to United States senator would require a physical impossibility or deny relator a constitutional right.

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The *Attorney General,* for the defendant *State Board of Canvassers,* cited 36 Cyc. 1160; McCrary, Elections (4th ed.) § 282; 15 Cyc. 383, 384; *State ex rel. Kustermann v. Board of State Canvassers,* 145 Wis. 294, 130 N. W. 489; *Gilleland v. Schuyler,* 9 Kan. 569; *Newton v. Board of Canvassers,* 94 Mich. 455, 53 N. W. 1043; *McKenzie v. Board of City Canvassers,* 70 Mich. 147, 38 N. W. 11; *May v. Board of Canvassers,* 94 Mich. 505, 54 N. W. 377; *Packard v. Board of Canvassers,* 94 Mich. 450, 53 N. W. 934; *Garth v. Campbell,* 130 Mich. 283, 89 N. W. 950; *Stockton v. Powell,* 28 Fla. 1, 10 South. 688; *State v. Gibbs,* 13 Fla. 55; *Att'y Gen. v. Board of County Canvassers,* 64 Mich. 607, 31 N. W. 539; *Smith v. Lawrence,* 2 S. Dak. 185, 49 N. W. 7; *Board of Education v. Welch,* 51 Kan. 792, 33 Pac. 654; *State ex rel. Reyburn v. Ringo,* 42 Mo. App. 115; *Mullins v. McKeel,* 24 Ky. L. Rep. 402, 68 S. W. 643; *Belknap v. Board of State Canvassers,* 95 Mich. 155, 54 N. W. 696; *Att'y Gen. ex rel. Bashford v. Barstow,* 4 Wis. 567, 797.

L. G. Wheeler, for the defendant *Board of Canvassers of Milwaukee County.*

A. C. Umbreit, for the defendant *McGovern.*

The cause was submitted to the court for determination and because of the exigency involved the following decision reached by the court was rendered without delaying for the purpose of preparing an opinion, resting the matter *in præsenti* by a brief statement of reasons, that to be followed later by an opinion.

The court considers that the several challenges of the claim that the various boards of canvassers should proceed to perform, diligently, their respective duties, as contended on behalf of the relator, should be overruled, basing such decision on this, in detail:

Sub. 1, sec. 87, Stats., requires the result, as to any county, of the election therein of officers mentioned in such section to

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be sent by the county clerk of such county, duly certified, to the secretary of state within the time specified in such section, and it cannot be delayed to wait upon the result of proceedings under sec. 86, Stats., and if such duty shall be omitted the right to a remedy by *mandamus* arises to compel performance; though reasonable time may be allowed to comply with the writ,—not delaying to complete proceedings under such section so as to prejudice reasonable performance under said sub. 1, sec. 87, Stats. Such undue delay would not be legally justifiable.

Under sec. 94*e*, Stats., the canvassing board must make its determination from the returns mentioned in sub. 1, sec. 87, Stats., and from such returns only. The statute contemplates but one return from each county and not returns in sections.

Sub. 2, sec. 94, Stats., requires the secretary of state to secure returns to be made as contemplated by sub. 1, sec. 87, and in case of omission so to do by the time mentioned in sub. 2, sec. 94, Stats., a right arises to a remedy by *mandamus* to compel performance of that duty.

Sub. 1 and 2, sec. 94*a*, Stats., requiring the *State Board of Canvassers* to meet on the 1st day of December succeeding a general election for the purpose of canvassing the returns and determining the result of such election and to perform its duties as such canvassers, subject to the right to adjourn for not more than ten days in all, is unaffected by sec. 86, Stats., though it is directory, in that the board does not lose jurisdiction to perform such duty by not completing its work without delaying to receive completed returns; but its duty is to proceed diligently to the end; securing possession of any missing returns as speedily as practicable. Such duty is absolute and unaffected by pendency of proceedings under sec. 86, Stats. In case of neglect to perform such duty a right arises to a remedy by *mandamus* to compel performance, though reasonable time may be allowed to make return to the writ, delay

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because of proceedings under sec. 86, Stats., not being legally justifiable.

Time for permissible delay of the state canvass having expired;

By the Court.—Ordered, that peremptory writs of *mandamus* be issued in accordance with the foregoing, due return to be made to such writs with all convenient speed and not later than the 15th day of December, 1914; that the motion to quash the alternative writ be denied, and that the demurrer to the returns be sustained.

The following opinions were filed January 12, 1914:

Conformable to the purpose as aforesaid of following at a later time the decision by an opinion covering the questions involved in the cause and discussed by counsel in submitting it, this has been agreed to so far as stated impersonally:

MARSHALL, J. Upon the court in this cause devolved the duty of determining the legislative intent, if possible, with any reasonable degree of certainty, embodied in ch. 328, Laws of 1911 (sec. 86, Stats.), and if that should be accomplished, perhaps, to determine to what extent the enactment is constitutional and how it applies to the facts required to be dealt with in the particular case, and if that should not be accomplished, to adjudge the act void for insolvable indefiniteness.

The field of duty suggested is the very highest and the most onerous incident to the supreme judicial function. While it requires a superlative degree of respect for the lawmaking power, it calls for a correlative degree of appreciation of the trust reposed here in respect to the matter, and of industry and courage to fully discharge it, regardless of the wishes of immediate parties to the litigation, or of any person or number of persons, and regardless of consequences to the personal

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instrumentalities here. The individual is here today, tomorrow, comparatively speaking, another is in his place; but the court lives on in its great impersonality, vindicating the wisdom which founded our system of government according as the design of it shall be appreciated and those who give it vitality come up to the ideal standard contemplated by the designers. No other attempt at a popular system has been enduring because no other system has had within itself the means, without violence, of remedying every defect which time and experience might develop or changed conditions require. There is no element in our system so vital to its efficiency for insuring to the people continued and full possession of their rights, as the independent division of the whole, vitalized by instrumentalities selected by the people, and answerable for the fidelity with which they perform their solemn obligation, only to the people. The restiveness sometimes observed, even in the learned profession of law, and often outside of it, because of the exercise of this particular function so as to produce results contrary to individual or factional, and sometimes popular notions, is rather evidence of defective conception of "that fundamental instrument under which all enjoy all the rights most dear to freemen, and to the support of which we are bound by the most solemn obligations which can possibly be imposed upon members of a social political organization," than of usurpation or faulty administration.

Perhaps it takes long judicial experience to appreciate how very important it is to have an independent authority to determine from the mass of things coming from legislative activity, what is legitimate and what is not, what is understandable and what is not, and what fits into existing law so as to be capable of being administered, and what does not. In this mass of things there are bound to be omissions, ambiguities, inconsistencies, contradictions within and between the within and the without, and sometimes violations of fundamental law. It was from that viewpoint that the power to

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do what we are called upon to do in this case, was created and lodged here. The necessity for activity of that power has grown very much in recent years, as the apparent and real necessity for regulation of things has been vitalized by a rapidly increasing mass of legislation, and perhaps by methods which have been very deterrent of individual study of enactments by those responsible for their appearing upon the statute books.

The field of the judicial function in dealing with such a law as we have before us, is closely fenced about. The court, while firmly maintaining its own function, must not pass beyond into the domain of legislative power. For the purpose of getting the sense out of an enactment, which the legislature purposed putting into it, not substituting some different sense therefor, or putting sense into the enactment where none can be evolved from it, words may be transferred, or rejected as surplusage, or given a very restrictive or comprehensive meaning, according to the evident intent, or supplied where manifestly in place by necessary or reasonable implication, and other liberties may be taken with an enactment, where necessary to solve uncertainty, so long as the effort goes no further than to reasonably read out of the legislative language that which was intended to be placed therein, and was discoverably so placed. But after exhausting all reasonable efforts to that end, if the discovered sense violates constitutional restrictions, the court must put its stamp of disapproval on it. It has no discretion in the matter.

If the law, given effect in its letter, would lead to consequences absurd or so unreasonable that by no fair probability was it so intended, yet a meaning from another viewpoint can be seen in the language which would avoid such consequences, and may probably have been intended, that should be adopted. But if some parts of an act are bad, fundamentally, or otherwise incapable of execution, yet such parts were not so far the inducement to the entirety that the legislature would probably not have enacted the balance by itself,

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then the residue is to be approved and the invalid or fatally indefinite or contradictory parts condemned. If the enactment is so uncertain that the court is unable to determine, with any reasonable degree of certainty, what the legislature intended, or it is so incomplete that it cannot be executed, there is no other course open but to condemn it as void for uncertainty, as this court has done on other occasions, and other courts have done so often that the duty in that regard has become a matter of unwritten law. *Norton v. Reed,* 6 Wis. 522; *State v. Wentler,* 76 Wis. 89, 44 N. W. 841, 45 N. W. 816; Lewis's Sutherland, Stat. Constr. (2d ed.) § 86 and cases cited. As well said in *State ex rel. Crow v. West Side St. R. Co.* 146 Mo. 155, 47 S. W. 959:

"An act of the legislature, to be enforceable as a law, must prescribe a rule of action, and such rule must be intelligibly expressed. . . . It is manifest that an act of the legislative department cannot be enforced when its meaning cannot be determined by any known rules of construction. The courts cannot venture upon the dangerous path of judicial legislation to supply omissions, or remedy defects in matters committed to a co-ordinate branch of the government. It is far better to wait for necessary corrections by those authorized to make them, or, in fact, for them to remain unmade, however desirable they may be, than for judicial tribunals to transcend the just limits of their constitutional powers."

We may well state here a few familiar rules governing the subject of interpretation and construction of statutes. They are a part of the unwritten, and as binding on courts as written, law.

(1) A statute is not to be viewed as if it were open to construction as matter of course. That is the first and primary rule for judicial guidance. It has been most commonly phrased as by Vattel (Law of Nations, book 2, § 263):

"It is not allowable to interpret what has no need of interpretation. . . . When the meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to

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admit the meaning the words naturally present. To go elsewhere in search of conjecture, in order to restrict or extend them, is but an attempt to elude them." "Such a method if once admitted would be exceedingly dangerous, for, there would be no law however definite and precise in its language, which might not, by interpretation, be rendered useless."

Thus it is clear, that need for construction takes hold where uncertainty of legislative meaning begins.

(2) Like all rules laid down in concise general terms in the old legal classics, the meaning of the foregoing basic precept has required and received elucidation which is a vital feature of it. "Words which are plain" do not mean, necessarily, in their literal sense. Language has a scope of meaning which includes literal sense,—that is a common ordinary meaning,—and a broader or restrictive meaning, according to the connections, subject dealt with, and objects in view. So whether words are plain or not, is to be viewed with reference to all these matters. If the meaning is manifest, it must be taken regardless of consequences, whether beneficial or harmful or fundamentally bad or fatally uncertain.

(3) The term "and leads to no absurd consequences" is important. In explanation of that feature we have the subsidiary rule that, while ambiguity is an absolute condition of construction, it may as well arise from application of words to their associates, the subject dealt with, or object to be attained, in legislative contemplation,—some or all of these features, as from literal sense.

(4) While it is presumed that simple words used in a legislative enactment were intended to be taken in their common ordinary sense; and that, in general, such is to prevail,—(*Absoluta sententia expositore non indiget*),—it is rebuttable in several ways, particularly by the principle that, the legislature, if it can possibly be avoided, is not to be convicted of intending absurd results or such unreasonable consequences as would shock one's common sense; but neither rules of lan-

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guage nor of law can properly be violated to avoid such penalty, whether it be public condemnation for an oppressive enactment or judicial nullification.

(5) The extent to which the court may go before reaching the result suggested is very great, if it keeps in mind, as the chief guide, effectuation of the legislative intent; but that intent must be read out of the law, either by looking at the words themselves or at them in the light of the characterizing features we have mentioned. An intent, however manifest, not discovered in the law and capable of being vitalized within the scope of it and fundamental restraints, must fail. As said by Lord CAMPBELL in *Coe v. Lawrance*, 1 El. & B. 516, and often approved by this and other courts: "I really cannot doubt what the legislature intended to do: but they have not carried it into effect. . . . It is better that we should adhere to the words they have used, than that we should strive to amend it." Also by Lord TENTERDEN in *Rex v. Barham*, 8 Barn. & C. 99: "It is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to have been the intention of the legislature." However, the very letter of an enactment may be violated to carry out a manifest legislative purpose, so long as the reasonable meaning be not overstepped.

(6) Within the principle last stated, where there is an irreconcilable conflict between the apparent meaning of an enactment and that of existing statutes, a presumption arises that the legislature contemplated no such result; but rather that the earlier law should be regarded as repealed or modified so as to preserve harmony; but that is rebuttable, efficiently, in several ways, at least so as to produce fatal uncertainty, particularly where the existing law consists of a system, perfect in itself as regards producing constitutional results, and the new feature very seriously interferes therewith and might do so fatally. If the fact be that, given ef-

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fect, an apparent purpose would appear to disturb an established system of written law, covering a vital field in our system of government—such as the reasonably speedy determination, *prima facie* at least, of the result of the election of persons to fill the various United States, state, and county offices,—the fact that such effect would be very remote does not efficiently neutralize the infirmity. If such might be the legislative effect without any fatal abuse, though quite improbable, that constitutes an infirmity which only the legislature can cure. *Fifield v. Close,* 15 Mich. 505.

(7) If after judicial labor to so construe a law shall have been exhausted, and some part of the enactment still is fatally uncertain or fundamentally bad, yet the rest of it constitutes, by itself, a legitimate idea within legitimate intention, and it shall appear that the valid part would have been enacted had it been appreciated that the other part was invalid, the one may be saved and the other not.

The foregoing observations and statement of principles, I have thought best to place in this opinion as a preliminary to search for the legislative meaning of the act of 1911, in question, and, if such search be successful, the extent to which such meaning can be legitimately given effect.

If one approaches the judicial analysis of a legitimate enactment—when so challenged as to raise the question of fatal inconsistency, uncertainty, or unconstitutionality—with proper conception of judicial authority and duty, and proceeds, by the very closely fenced about method of fundamental and unwritten law, to the finality, there is little or no danger but that the mists which may at first surround the point of destination, will be so cleared away as it is approached, that the judicial anchor may, in the end, be so confidently and clearly cast at the right spot, as to satisfy all who are so equipped as to intelligently study the matter and look at it through the vista of reason rather than that of partisan desire or defective notions of, or mental disloyalty to

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our tripartite divisional system of government, having the whole power of the people to say what the law is, intrusted to the judicial department.

Under sec. 1, art. XIII, of the state constitution, the political year commences on the first Monday of January. All constitutional elective state and county offices are to be refilled once in two years and the election, on each occasion, is required to be on the Tuesday succeeding the first Monday of November preceding the commencement of the next political year.

Thus, the time intervening between an election and that for the newly chosen to be possessed of the primary right to take their respective offices and to otherwise duly qualify therefor, is fundamentally limited to, substantially, sixty days. In that time there must be a canvass of the votes cast in the several election districts; a return of the results to county authority in the matter, the enforcement thereof, if need be, and correction of defective district returns; the county canvass of such returns and return thereof to state authority; enforcement of such return, if need be, and correction of defective returns, and canvass thereof. The various steps call for performance of purely ministerial duties and singleness of return in each case; whether of district canvass to county authority or county canvass to state authority. It may be the legislature could disturb the unity of system and singleness of feature, as to returns, so long as certainty were not jeopardized of reaching the final result by a reasonable time before commencement of the political year to enable the newly elected to be ready at the appointed time to take office; but, any disturbance liable to go further would be of very doubtful constitutionality, and would be productive of such confusion in public affairs that anything short of an express purpose in that regard would leave the legislative effort too uncertain of meaning to be adopted as within legislative intention.

Consistent with the constitutional plan as to the political

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year and brief time between choice of all state and county elective officers for determination of results and qualification of candidates by *prima facie* right and otherwise to take office, and in substantial harmony with the law as it existed at the time of the formation of the constitution, which its framers evidently had in view, the legislature, early, provided for the necessary administrative machinery. Ch. 6, R. S. 1849. That remained without any material change until passage of the law of 1911 which is here involved. Ch. 7, R. S. 1858; ch. 5, R. S. 1878; ch. 5, Stats. 1898, Stats. 1911, and Stats. 1913.

The plan of administration aforesaid was judicially reviewed in *Att'y Gen. ex rel. Bashford v. Barstow,* 4 Wis. 567,—it being held that all the proceedings from initiation of an election up to the final qualification of the newly elected to take the oath of office are purely administrative and exclusive—though not beyond judicial review after the manner of legal remedies—and that the law contemplates but one ministerial canvass,—that to be complete in every respect,—first in the election districts, then in the counties, and then by state authority,—the decision of the administrative board in each case, to cover the subject within the scope of its duty as an entirety,—first the initial authority and then the county authority,—by a single return. The decision, in effect, is that county certificates of election are all due at one time, the several rights to wait upon completion of the canvass, and statement certifying the same. Returns in sections or of a supplemental character, or made otherwise than by the officers and in the manner and time specified in the written law, were held to be *ultra vires* and not to be considered by the canvassing boards. Very strict adherence to this system was thought to be necessary, evidently for many reasons, particularly because of the purely administrative character involved, and the expedition and positive character of each step necessary to efficiently traverse the course from election day to the time for incumbency of the various offices to change.

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Conformably to that, the legislature early adopted that which, without any considerable change, has been preserved through all the revisions since 1858, and is now found in sec. 94*e*, Stats. It originated in ch. 78, Laws of 1858, evidently, at the first opportunity after the excitement and partisan feeling caused by the Bashford-Barstow contest had subsided so as to give time for calm reflection and judgment. As first adopted, with such eliminations and interpolations as necessary to fit it into the present system of chapters and sections, it is as follows:

Canvass, how made. Section 94*e*. The board of state canvassers, in canvassing to ascertain the result of any election, shall canvass only the regular returns made by the county boards of canvassers, as provided in this chapter, and shall in no case canvass or count any additional or supplemental returns or statements made by any such board or by any other board or person whatever; nor shall the board of state canvassers canvass or count any statement or return of the result of any canvass which shall have been made by any county board of canvassers at any other time than that mentioned in this chapter.

The decision in the *Bashford Case* was approved in *State ex rel. McDill v. Board of State Canvassers,* 36 Wis. 498. The court held that a canvassing board cannot go into the subject of frauds or illegalities in the election for the purpose of awarding a certificate of election to the person legally elected, other than such as appertains to complete performance of the ministerial duty of canvassing, counting, tabulating, and returning the number of votes actually cast, and the persons for whom cast. All idea of complaints before a canvassing board of frauds or illegalities, other than as indicated, followed by trials upon evidence given by witnesses with the characteristics of a trial, as between party and party, represented in person and by attorney, was rejected most emphatically.

The first step after the election is the canvass by district authority and return to county authority. One week is af-

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forded for this feature to work out so as to enable the latter authority to operate. Sec. 81, Stats. Time and machinery are provided for securing belated returns and correcting mistakes before commencement of the county canvass,—such commencement not to occur until correct returns shall be in hand from all the districts. Secs. 81, 82. This time is limited by the seventeen days allowed for transmission of county returns to the secretary of state. Sec. 87, Stats. Thus about twenty-four days are set aside for the matters aforesaid, at the end of which time the result of the county canvass is required to be published (sec. 84, Stats.), and certificates of election to be issued as to county officers and returns to be made to the secretary of state as to state offices. The latter is, plainly, to wait upon the time for issuance of the local certificates because the canvass is required to be an entirety.

At the end of the activities stated, that of state authority commences. Formerly the time set for that was December 15th after the election. Now it is December 1st. Sub. 1, sec. 94*a*. The change was made by ch. 459, Laws of 1913.

Thus it will be noted that, whereas, prior to 1913 state authority was afforded some fifteen to seventeen days to secure possession of county returns and prepare to enter upon performance of the duties of making a state canvass, only two days or thereabouts are now afforded, with power to adjourn as necessary, not more than ten days, as formerly, before proceeding to the continuous work of reaching a final result. Sub. 1, sec. 94*a*. Like the county canvass, the statute contemplates that the state canvass shall be entered upon only when all returns are in, and be closed as to all offices, by a single decision.

Prior to the amendment of 1913 there was a limit of about twenty days for the state board of canvassers to do its work; but the actual time, it was evidently thought by the legislature, should be short because, after the first ten days, no time of adjournment was provided. Expedition, in view of the short time left for commencement of the next political year,

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was evidently contemplated, since it was provided that upon a decision being reached, certificates of election should be forthwith issued. Sec. 94*b*, Stats. Provision was made for only one decision, to be embodied in one statement, that to be spread upon the record as a basis for the *prima facie* evidences of the right of the successful candidates. Sub. 4, sec. 94*a*, and sec. 94*b*, Stats.

From the foregoing, it is easily seen that, the time limit upon the county board of canvassers is too short to admit of any interference, except for correction of mistakes, apparent upon mere inspection. Complaints, with charges of fraud and invalidity, involving trials, somewhat after the manner of judicial investigations, are out of the question, if the consequence would be to delay the final closing of the county canvass by the time limited therefor. Neither such time nor that for state authority to act, admits of much interference without probabilities of the constitutional requirements being invaded.

As indicated, seventeen days spans the time afforded a board of county canvassers. When the change took place which gave rise to this litigation, about the same time was afforded to state canvassers, with ten days for necessary adjournments. The total has been increased fifteen days by reducing the period of preparation for organization of the board to that extent. The period for necessary adjournments remains the same as before. So it is quite evident that there was no thought of changing the time to accommodate delays in completing the work of county authority and filing the evidence thereof. Had that been in the legislative mind, the time for commencement of the state canvass would have been placed later instead of fifteen days earlier than formerly, since the origin of the system, until two years after the change in 1911.

No more need be said to demonstrate that the statutory period provided for from 1858 to the change in question for completion of the work of county authority in respect to the

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subject under discussion, and the time for everything to be in hand for the work of state authority in respect to such matters, is of such vital importance,—in view of the required status of the newly elected officers at the opening of the political year succeeding their election,—that there was little or no room for the court, in the *Bashford-Barstow Case,* to come to any other conclusion than that the time and manner prescribed for doing the work was not directory so as to permit variation as to period of completing of the statutory tasks. That is so vital that a material change ought not to rest in mere statutory construction. Certainly, an additional paragraph, having no express relation to the system as a whole, should not be so construed as to efficiently interfere with the constitutional requirement for the newly elected to be conditioned to take their respective offices at the beginning of the political year. The contrary would be so unreasonable, the court should not convict the legislature of intending it.

Now we will turn to the act of 1911 under which the recount proceedings were instituted. Such proceedings were in progress when this action was commenced, with strong probabilities of delaying issuance of county certificates of election until after expiration of the time for making the returns to the secretary of state as required, in letter, by sec. 85 and sub. 1, sec. 87, Stats., and threatening to delay the state canvassing board from going on with its work to final effect without adjournment within the time prescribed by the letter of secs. 94*a* and 94*b* and the constitution as well.

The new feature, without any repealing clause or other express change of existing statutes, was projected into the body of the old system between sec. 85, Stats., relating to the final act of the county canvassers, and the section requiring the returns to the state secretary to be made within seventeen days after the election, in these words:

"1. Whenever any candidate, voted for at any primary or election, shall, on or before the last day of the meeting of the board of county canvassers, file with the county clerk a veri-

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fied petition setting forth that he was a candidate for a specified office at said primary or election, and that he is informed and believes that a mistake or fraud has been committed in specified precincts in the counting or return of the votes cast for the office for which he was a candidate, or specifying any other defect, irregularity or illegality in the conduct of said primary or election, said board shall forthwith proceed to ascertain and determine the facts alleged in said petition and make correction accordingly and recount the ballots in every precinct so specified in accordance therewith. Such petition shall first be served, as in case of summons in a court of record, upon all opposing candidates, if an election, and the opposing candidates of the same party, if a primary. Such petition and proof of service thereof shall be filed with the county clerk, together with a fee of two dollars for each precinct in which a recount of the ballots is demanded in said petition. The affiant and all opposing candidates shall be entitled to be present in person and by counsel and observe the proceedings.

"2. Each member of said board of canvassers, for the purposes mentioned in this section, shall have power to administer oaths, certify to official acts and issue subpœnas, and the provisions of section 1797—13, with regard to compelling the attendance of witnesses, shall apply to the proceedings before such board, except that the fees of witnesses shall be paid by the county.

"3. Within five days after the determination of said board, any candidate aggrieved thereby may appeal therefrom to the circuit court of said county, by serving a notice in writing to that effect upon such other candidates who appeared before said board. Such notice shall be filed with the clerk of the circuit court, together with an undertaking by the appellant, with surety to be approved by the clerk of said court or the judge thereof, conditioned for the payment of all costs taxed against said appellant. The circuit judge shall forthwith issue an order directing the county clerk of said county to transmit to the clerk of said court forthwith all ballots, papers and records affecting such appeal and fixing a time and place for hearing thereon, in open court or at chambers, or before a referee, not later than five days from the making of such

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order. Such order shall be served upon the county clerk and all such other candidates who have appeared before said board. A reference may be ordered upon any or all questions. At the time and place so fixed the matter shall be summarily heard and determined and the costs taxed as in other civil actions.

"4. Nothing in this section shall be construed to abrogate any right or remedy that any candidate may now have affecting the trying of title to office."

The method, indicated, of constructive work, is of modern use, so far as this state is concerned. To thrust an important provision with many details into an existing statutory system for dealing in the entirety with a basic part of state organization,—no express regard being paid in the body of the new creation to inconsistencies between it and the letter and spirit of the context and without any repealing clause,—would naturally lead to such confusion as we have now to deal with. An abandonment of the method would promote certainty, lessen litigation growing out of ambiguities and incongruities in legislative enactments, promote discovery of legislative intention, and lessen danger of such intention failing or being more or less involved in obscurity.

What did the legislature mean by the language, "Any candidate, voted for at any primary or election?" Note that it applies to every candidate for a county, federal, and state office. The language is too plain in that respect to admit of any question.

We note that the supreme court of the state of Michigan in dealing with a similar situation, in several instances, held that the offices to which the law would not apply without absurd results, or results entirely inconsistent with administration under other enactments not referred to, were not within its purview. *McGuire v. Circuit Judge,* 69 Mich. 593, 37 N. W. 568; *Wheeler v. Board of Canvassers,* 94 Mich. 448, 53 N. W. 914; *Belknap v. Board of Canvassers,* 94 Mich.

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516, 54 N. W. 376; *Naumann v. Board of City Canvassers*, 73 Mich. 252, 41 N. W. 267; *Vance v. Board of Canvassers*, 95 Mich. 462, 54 N. W. 1084.

That is an easy way to revise uncertain legislative work, but we are constrained not to yield to the urgency of counsel to follow it. When the legislature, in language as plain as can be chosen to express an idea, declares that "any candidate, voted for at any primary or election" shall have the benefit of a particular remedy, as in the act in question, it would be taking more liberties therewith, than would seem to us within the judicial function, to restrict it to such offices as it might reasonably have been made to apply to, and not apply it to the rest, where there is as much reason in one class as in the other, as regards need for such a remedy. How can the court say, with any fair degree of certainty, that the legislature did not intend just what its language naturally imports? To our minds it falls within the rule precluding revision by judicial construction.

Again, how can it be held, under rule 7 stated, with any fair degree of certainty, that the legislature would have favored the proposed enactment had it been supposed it might be applicable or not, according as the court might deem practicable, saving the letter and spirit of existing legislation? It seems to me that there is too much uncertainty at this point for holding that the enactment may be saved in part and condemned in part.

Assuming, as we must, that the legislature did not intend to disregard the constitutional requirement for newly elected officers to be in readiness to take office at the commencement of the new political year, how can we say with any reasonable degree of certainty, that could be done without disturbing the existing law, since the provisions thereof and those of the new enactment cannot stand together without the one yielding to the other? Looking at the matter from that viewpoint, in view of the obstacles in the way, can it be held with any rea-

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sonable degree of definiteness, whether the legislature purposed having the later act restrained to harmonize with the earlier one, or that the latter should be held modified to harmonize with the former?

Taking one horn of the dilemma described, and we are met with the plain letter of the act with no method of changing it except by adding words in a legislative way, contrary to our rule 5 and others. Taking the other horn of the difficulty and we are met with such a "Pandora's box" of difficulties that one would hesitate to lift the lid lest they should irretrievably escape with serious vexatious consequences and leave not even hope.

There is the capacity for any candidate to institute a recount proceeding while yet the canvassing board is in service.

There is the possibility for recount after recount, tacking one to the closing activity of another and in the aggregate lasting long after the limit fixed by the letter of the law for reaching a final determination, and even after the time fixed for commencement of the term of office.

Then, since there can be but one return unless the law is to be regarded as impliedly changed in one of its most essential features, the holding up of the finality for part of the offices would hold it up as to all.

Then, there is the extraordinary scope of the law. The canvassing board is empowered to try any question of fraud in the counting or return of the votes cast "and any other defect, irregularity or illegality in the conduct of said primary or election." Did the legislature intend to clothe each county canvassing board with full judicial powers, as the quoted language, in the letter, would indicate? If not, and we must take that aspect of the matter if reasonably possible,—since the other view would condemn the law, in part at least, and greatly endanger the whole as unconstitutional,—what is the intended scope of the new power?

Then, there is the right of appeal by any candidate, ag-

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grieved by any decision in a recount proceeding. While the determination might, by a sort of revolving course, contest tacking onto contest, lasting indefinitely, and, in the whole, be delayed a long time,—five days is allowed for taking an appeal by any candidate conceiving himself aggrieved; and then five days more for bringing the matter to a hearing before the circuit judge. The contest is to be then summarily heard, but must, necessarily, wait upon the ability of the judge to immediately take up the matter,—in view of many interferences which might be suggested,—and the course of things in executing a reference which is provided for "upon any and all questions." The probable end of such litigation no one would venture to suggest. Did the legislature intend this, or if not, what is the reasonable solution of the matter?

By the letter of the act, it will be seen, the finality as to county officers, all of them—regardless of whether there is any doubt as to the result as to one or more,—and the finality as well as to state officers, must wait upon results of the appeal, because, pending the litigation, the court is required to have possession of "all the ballots, papers and records affecting such appeal." Did the legislature intend such a state of things, and if not, what is the reasonable solution of that matter?

If it should be said this latter feature of the law is unconstitutional, or this and the one delegating the broad powers indicated to the canvassing board to try questions after the manner, substantially, of a *quo warranto* proceeding, is there reasonable ground under our rule 7, for holding the legislature would have favored the enactment without such features?

Again, was it intended that the special remedy, if resorted to, should be exclusive, or that after having run its course, that "any candidate may still resort to any other ordinary remedy," "affecting the trying of title to office?" If it was not intended to create a new remedy for trying title to office, why did the legislature, *ex industria,* provide "nothing in this

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section shall be construed to abrogate the right or remedy that any candidate may now have affecting the trial of title," etc.? If such a remedy was in the legislative mind, was it intended that it should extend to offices in respect to which the title is a matter exclusively within the jurisdiction of other tribunals, such as the state assembly and senate, and the houses of Congress?

Many other uncertainties might be pointed out. In the aggregate they make about as complicated and uncertain a situation as could be imagined. Just the scope of the pronouncement that should be made under the circumstances, is difficult to arrive at with any degree of unanimity. There is the view that the whole act is so involved in uncertainty that it should be declared incapable of execution and void on that account under the rule stated in the opening part of the opinion. For myself, I have no hesitation in saying that I incline to that method of thus entirely clearing the written law of the state of the perplexing enactment; but I hesitate in deference to a less radical course. Then there is the view, which is pretty satisfactory to the majority, at least, that the legislature either did not intend to disturb the existing law, or that its purpose, so far as it would prevent the county canvass and the state canvass from being concluded within the time prescribed in such law, is so involved in obscurity as not to be discoverable with such reasonable clearness as to form a legitimate basis for a judicial conclusion.

On the whole, it is considered that this latter view is as far as the court can go. That would result in there being a want of jurisdiction to continue recount proceedings after expiration of the time for making county returns to the secretary of state, or, in any event, the time limited for the state board to enter upon its work without capacity to adjourn, viz. the 10th day of December succeeding the election.

The latter limit was substantially reached when the cause was submitted, and wholly so when the decision was ren-

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dered; and, it being practically conceded that the recount proceedings were then entirely inconclusive, and appearing that full performance of duty under sub. 1, sec. 87, could not wait upon the uncertainties of proceedings under the new section (sec. 86), it was considered that it was the duty of the county canvassing boards to speedily conclude their labors from the election district returns and make due report thereof under sub. 1, sec. 87, and for the state canvassing board to perform its duty under sec. 94*e*, acting upon said returns only; and that the duty of the latter board under sub. 2, sec. 94, and sub. 1 and 2, sec. 94*a*, Stats., is mandatory as regards any right to delay to accommodate proceedings under sec. 86,—though so far directory that jurisdiction continued for full performance after the time limited for delays by adjournments under sub. 1 and 2, sec. 94,—and that for omission of duty in respect to any of the situations mentioned, *mandamus* will lie to compel performance.

Thus it will be easily seen, the intention was, as was supposed to have been understandingly expressed, to decide that the time having gone by for further proceedings under sec. 86, so far as the court could see its way clear to give effect thereto, they should cease. The order was entered accordingly as indicated in the statement.

The further clearing up of uncertainty created by the law in question is thus left by the court for the legislature. It were better, it is considered, as said, in effect, in another jurisdiction quoted from in the opening part of this opinion, for the lawmaking power to do that, "than for the court to transcend the just limits of its jurisdiction." The court can go to the extent indicated without disturbing the integrity of the system which exists irrespective of the act of 1911. Restrained now to that extent it can do no hurt. The legislature may safely be intrusted to perform its duty as to the rest. In closing I am constrained to add, for myself again, that I think the court would be justified in declaring the act of 1911

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wholly void for uncertainty, and that the co-ordinate branch of the government would be well satisfied with the assistance thus afforded it.

BARNES, J. (*dissenting*). Ch. 328, Laws of 1911 (sec. 86, Stats. 1913), is not a piece of legislation upon which its author can gaze with the satisfied and admiring eye that Micawber bestowed on his epistolary compositions. It is an act that appears to be thrown in a haphazard way among a lot of other provisions for which it has little affinity. It is a sort of a waif, an incongruity, a stranger in a strange land.

If it did not emerge *hors de combat* from its contact with this court, it carries as many battle scars as some of the unfortunate noncombatants in the present war. Its fangs, if it had any, have been extracted. It is now neither useful nor ornamental to any appreciable extent.

It would have been better had the legislature remodeled some other election statutes at the time it passed this one, to preserve at least the appearance of harmony if nothing more.

I fully realize that it is much easier to criticise laws after they are in working operation than it is to draft them when foresight is the only guide. Legislative prevision is at a disadvantage when pitted against judicial hindsight. But the responsibility for drafting statutes is placed with the legislature and must rest there. This court is not an upper house to work over legislative enactments and fashion them as the court imagines they would have been fashioned by the law-making power had it been confronted with the situation that confronts the court. The remedy, if there is any, is to cut down the quantity and improve the quality of our legislation. This may not be the right cure, but whatever the remedy may be, it rests with the legislature and not with the courts. If any authority for this proposition is needed, the reader is respectfully referred to Mr. Roe's book entitled "Our Judicial Oligarchy." The court feels at times that it could improve

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on the legislation that comes before it. It is not improbable that the legislature at times feels that it could make better decisions than the court does. Possibly this feeling is not confined to the legislature. But each has its particular field of labor cut out for it by the constitution, and neither should encroach on the prerogatives of the other.

Briefly stated, the position of the court seems to be this: If the law means what it says, it is unconstitutional, or else too indefinite for enforcement; ergo, the legislature, while thinking one thing, inadvertently said something else. In other words, it miswrote its state of mind. It is too bad that our language is not more exact. I have sometimes noticed a lack of clarity even in judicial decisions made in other jurisdictions. After giving the court all due credit for judicial acumen and courage, I am unable to agree to the conclusion reached.

In construing a statute it is hardly fair to begin by conjuring up a lot of ghosts or by setting up straw men so as to indulge in the pleasure of knocking them down. When we let loose our imaginative powers, there is hardly any limit to the heights to which we may soar or to the depths to which we may descend. We can imagine that Roosevelt will insist that Taft is the logical candidate for President at the next election, or *vice versa;* or that the English Parliament will soon pass a vote of confidence in the Kaiser or in G. Bernard Shaw, or that the English and German governments will agree on who was responsible for starting the war, or that the present war will be the last one; or even that a constitutional government will be established in Mexico within the next half a century. But a statute should not be compelled to run the gauntlet of any such farfetched possibilities.

On its face, sec. 86 is a plain statute at least as far as it goes. It becomes doubtful and uncertain only when we start out by assuming that the legislature did not mean what it said and therefore furnished one more enigma for the citizen and

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the courts to wrestle with. The statute provides that whenever any candidate is informed *and believes* that a *mistake* was made *or fraud* was committed in the *counting* or *return* of the votes cast in specified precincts, or that there was any other defect, irregularity, or illegality in the conduct of the election, he may file a *verified* petition with the county clerk setting forth the wrong which he believes has been done him. He must make a deposit of $2 for each precinct in which he finds fault with the result and serve notice on the opposing candidates, who have the right to be present while the county canvassing board proceeds to pass upon the matters complained of. A review of the decision reached may be had by appeal to the circuit court.

The scope of the section seems to have been greatly misapprehended in this case. It provides a summary method for correcting errors in the counting and return of votes and of dealing with fraudulent votes when the fraud is brought to the attention of the canvassing board by the petition asking for the recount. It neither provides for nor contemplates a trial after the manner of court procedure. It carefully excludes any such idea, by permitting the parties to be present in person and by counsel, to the end that they may "*observe* the proceedings," not participate in them. There is no reason why the work cannot be carried to a conclusion speedily, or why any one should be deprived of the sacred right to hold office because of the law. The relief provided for will be sought only in cases where the vote is close. It is no benefit to the unsuccessful party to hold up the result of the election, and as an evidence of good faith he must deposit $2 for each precinct in which he desires a recount. To assume that all of the candidates who are apparently defeated will rush in to demand a recount is creating a bogeyman, and if they should do so it would not make any difference with the validity of this statute.

Now there ought not to be any doubt even in the minds of

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judges as to the purpose of the statute here involved. It was passed to insure honesty in elections. It is more important that the result of an election be determined correctly than that it be decided quickly. A candidate who is not elected should not be placed in office because of errors made in his favor, much less as a result of deliberate fraud. The defeat of the will of the majority is subversive of our whole system of government. Anything that seeks to preserve the integrity of the ballot should be commended. It may not be very important whether Jones or Smith performs the duties of a certain office, but it is very important that Jones should not do so if Smith was in fact elected and is qualified. How purity in elections may best be preserved is for the legislature to decide. It must perforce adopt what it conceives to be the policy best calculated to produce this result. That a court or some other body thinks it could prescribe some more efficient method is of no consequence. When the duly constituted authority has spoken, its fiat is the law of the state, if no constitutional infirmities are found in the law.

There is no suggestion in sec. 86 that the boards of county canvassers must stop proceedings at the expiration of any particular time. On the contrary, such a board is specifically required to "further proceed to ascertain and determine the facts alleged in said petition and make correction accordingly and recount the ballots in every precinct so specified." It is a mere idle farce, a waste of energy, to require a canvassing board to act under the statute, if it cannot continue until it is through, and there is nothing in the law to indicate that any such thing was intended. The object of the statute was to provide a method of ascertaining a pure question of fact, not compel an administrative body to imitate the action attributed to the King of France's forty thousand men.

Now the heavens would not fall if someone about whose election there is a substantial doubt should fail to get into office on scheduled time. It may turn out that he does not belong there, and I am unable to see wherein fault should be

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found with legislation which establishes an orderly and expeditious procedure to determine whether he does or not.

I concede that a proceeding under this statute involving a state officer may require the state canvassing board to adjourn more than ten days from the 1st of December. There are two perfectly good answers to the reasoning of the court on this point. One is that sub. 3, sec. 94*a*, is directory as to time (and I predict that the court will so hold if a case arises involving title to office where the board has for any cause adjourned for a longer time), and the other is that if there is a conflict, the statute enacted last in point of time should prevail.

It is said that the statute under consideration cannot be enforced as written, because it would violate sec. 1 of art. XIII of the constitution. The material part of this section provides that the political year for the state shall begin on the first Monday in January in each year, and that the general election shall be holden on the Tuesday next succeeding the first Monday in November. I do not see where or how the statute runs counter to this section of the constitution. If any provisions of the constitution are affected, it would appear to be those that prescribe the length of the term of office of members of the legislature and other constitutional state officers. If newly elected officers cannot qualify before their terms begin, it might be said that they were deprived of the right to hold their offices for the full term. These provisions do not mean, however, that contests over offices must be settled before the term begins or else they cannot be settled at all. Mr. Barstow's title to office was tried and determined after he received the certificate of election and took his seat, and he was ousted from the office of governor by this court. In the *Bashford-Barstow Case,* 4 Wis. 567, the court said very distinctly that it was the *election* and not the canvass of votes or the certificate of election that conferred the right to hold office. The machinery for determining the result of an election must, under the constitution, be provided by the leg-

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islature, if any machinery is to exist different from that prevailing at common law. The legislature has the right to repeal any legislation which it enacts, save when vested rights would be thereby destroyed. It has the right to adopt all suitable and proper means to preserve the integrity of elections, even to the extent of debarring the person elected from taking office at the appointed time, where it is necessary to do so in order to ascertain who in fact is entitled to the office. It is not shown in the present case that the statute under consideration would prevent the issuance of a certificate of election before a term of office begins, and, if it were so shown, the law would not be invalid for that reason.

I shall allude but briefly to Mrs. Pandora Epimotheus's box of difficulties which the court has discovered. They are largely imaginary. I see no difficulty in the way of determining and certifying the election of county officers in the usual manner, where no recount is sought, even though a recount is asked as to a state officer. I do not even see any great difficulty in the way of certifying the returns as to state officers where there is no contest and making a supplemental return as to those on which there is a contest after such contest has been decided, and I am decidedly of the view that the legislature has the right to confer on canvassing boards each and every power and duty prescribed by sec. 86. I further think that these duties can by the exercise of reasonable diligence be performed so as to enable every patriot to take his office at the appointed time. If, however, it should take a longer time to ascertain who is in fact entitled to the office, such time may be taken without violating the constitution.

WINSLOW, C. J. I agree with the conclusions reached by Mr. Justice BARNES.

TIMLIN, J., took no part.

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STATE EX REL. ZABEL VS. BOARD OF CANVASSERS OF MILWAUKEE COUNTY and others.

December 11—December 12, 1914.

***State ex rel. Husting v. Board of State Canvassers, ante,* p. 216, followed.**

MANDAMUS action to compel the *Board of Canvassers of Milwaukee County* to complete its canvass of the returns from the various election districts in such county of the results of the election for county officers held in November, 1914, and to issue certificates of election, evidencing the result of the canvass, particularly as to the relator, *W. C. Zabel.*

Issue was joined by demurrer to the return.

The reasons given, in the return, for delay are substantially the same as in *State ex rel. Husting v. Board of State Canvassers, ante,* p. 216, 150 N. W. 542, viz. pending proceedings for a recount under the provisions of sec. 86, Stats.

W. B. Rubin and *W. C. Zabel,* for the relator. [No brief on file.]

L. G. Wheeler and *H. S. Sloan,* for the defendants. [No brief on file.]

MARSHALL, J. The question raised in manner aforesaid is ruled in favor of the plaintiff by the decision in *State ex rel. Husting v. Board of State Canvassers, ante,* p. 216, 150 N. W. 542, and for the reasons which will be found stated in the opinion in that case. Following such decision the court ordered herein thus:

(1) That the demurrer to the return be sustained, and

(2) That a peremptory writ of *mandamus* issue, returnable with all convenient speed and not later than December 15, 1914, commanding that said canvassers make the statement of votes cast for county officers in Milwaukee county, file the same with the county clerk, and publish the

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results, and that the county clerk issue certificates of election thereon, all as provided by secs. 83, 84, and 85, Stats.; and it appearing that the time for efficient recount proceedings has expired, further ordered that all recount proceedings under sec. 86 do now cease.

WINSLOW, C. J., and BARNES, J., dissent.

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CASES DETERMINED

AT THE

January Term, 1915.

PIETSCH, Appellant, vs. MCCARTHY, Respondent.

October 28, 1914—January 12, 1915.

Automobiles: Collision with wagon: Contributory negligence: Milwaukee civil court: New trial in circuit court: Appeal: Affirmative relief to respondent: Directing judgment.

1. In an action for the injury to an automobile which, in the evening, ran into the rear of a wagon on a city street, plaintiff's own testimony that he was running his car at a speed of from ten to thirteen miles per hour, that his vision was so dazzled by the headlights of automobiles coming in the opposite direction that he could not see the wagon ahead of him, and that in this situation he proceeded a distance of 100 feet without slacking his speed until he bumped into the wagon, is *held* to show his contributory negligence as a matter of law. Sec. 1636—52, Stats. 1913.
2. Upon such evidence the circuit court, on reversing a judgment of the Milwaukee civil court in plaintiff's favor, should have dismissed the complaint instead of ordering a new trial.
3. A new trial having been ordered when the complaint should, instead, have been dismissed, upon an appeal by the plaintiff the order is reversed and a judgment dismissing the complaint is directed, although the defendant did not except to the order or appeal therefrom.
4. Any rules of practice heretofore existing which prevent a judgment finally terminating litigation in a case where the record is properly before the supreme court and it is apparent that further proceedings could only result in unnecessary expense, are abrogated; and conflicting cases are overruled.

TIMLIN, J., dissents.

APPEAL from an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

Plaintiff brought this action in the civil court of Milwau-

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kee county to recover damages caused to his automobile by running into the rear of a wagon that was being driven by the defendant on one of the streets of the city of Milwaukee. The collision occurred shortly after 6 o'clock on October 16, 1913. It was drizzling rain and quite dark. The alleged negligence of the defendant consisted in not carrying a light as required by a city ordinance. The plaintiff gave as a reason for not seeing the wagon in time to avoid the collision that his power of vision was obscured by the headlights of automobiles approaching him. Plaintiff had his side lights lit, which threw light ahead of him about ten feet. There was a general verdict for the plaintiff, by which his damages were assessed at $95.83. Judgment was entered thereon and an appeal was taken to the circuit court. The latter court made findings of fact and conclusions of law in the case. The findings of fact material to the questions raised on this appeal are the following:

"VII. That the testimony showed that the plaintiff was running an auto westerly on Grand avenue between Thirteenth and Fourteenth streets, moving at the rate of thirteen miles an hour, that the defendant was driving a heavy team and an empty dump wagon, in the same direction, going at three or four miles an hour, and that it was after sundown.

"VIII. That the plaintiff, going at the rate of thirteen miles an hour, ran into the rear end of the defendant's dump wagon, knocking down one of the horses and nearly threw the defendant into the street.

"IX. That at the time many autos on the other side of the street were moving east, that they had very bright lights, or what the plaintiff calls 'bullseye' lights, and that for a hundred feet before the collision the plaintiff was blinded by these lights so that he could not see anything ahead of him, and yet he kept moving at the same rate, thirteen miles per hour or over nineteen feet per second.

"X. That the plaintiff did not have at least one lamp giving a reasonably bright light, on the front of his auto, as he only had side lights of oil burning at the time.

"XI. That the plaintiff, when his view in the direction in

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which he was running his auto was obscured, failed to reduce his speed to such a rate as would tend to avoid danger and accident, and permit him to bring his auto to a complete stop within the distance ahead that he could with the aid of the lights thereon, in connection with the lights from other sources, see an object the size of a person.

"XII. That the collision occurred within forty or fifty minutes after sundown.

"XIII. That the city ordinance required lights to be on such vehicles as the one driven by the defendant, one hour after sundown."

As conclusions of law the court found:

"I. That the civil court erred in refusing to grant a nonsuit, for the reason that the plaintiff failed to make out a cause of action for negligence against the defendant.

"II. That the plaintiff is guilty of negligence, proximately contributing to the damage, in not placing in the front of his auto, at least one lamp giving a reasonably bright light; in not reducing his speed when his view in the direction in which he was running his auto was obstructed, to such a rate as would tend to avoid danger and accident; and in not reducing his speed when his view in the direction he was running his auto was obstructed so as to permit him to bring his auto to a complete stop within the distance ahead that he could with the aid of the lights thereon, in connection with the lights from other sources, see an object the size of a person.

"III. That the negligence of the plaintiff, in violation of the statutes requiring lights and speed, proximately contributed to his damages."

A new trial was ordered by the circuit court, and plaintiff appeals.

The cause was submitted for the appellant on the brief of *Charles E. Hammersley,* and for the respondent on that of *Samuel Wright.*

BARNES, J. The plaintiff testified that he was proceeding at a rate of speed of from ten to thirteen miles an hour; that his vision was so dazzled by headlights of automobiles coming

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in the opposite direction that he could not see the wagon ahead of him; and that in this situation he proceeded a distance of 100 feet without slacking his speed until he bumped into the wagon, which he did not see until he struck it. It seems clear under these facts that he was guilty of contributory negligence as a matter of law under the decision of this court in *Lauson v. Fond du Lac,* 141 Wis. 57, 123 N. W. 629. The legislature of 1913 adopted the rule of law laid down in this case by enacting ch. 602 of the laws of that year, which appears as part of sec. 1636—52, Stats. 1913.

This court held in *Mueller R. E. & I. Co. v. Cohen,* 158 Wis. 461, 149 N. W. 154, that the circuit court might, on an appeal taken from the civil court, reverse the judgment on the record returned and dismiss the complaint, and that it was not obliged under the Civil Court Act (sec. 28, ch. 549, Laws of 1909) to order a new trial. The contributory negligence of the plaintiff in the instant case was established by his own testimony, so that recovery is impossible unless that testimony should be substantially changed on a subsequent trial. New trials are not granted to induce litigants to commit perjury, and the circuit court should have entered judgment dismissing the complaint.

The respondent took no exception to so much of the order as granted a new trial, has taken no appeal therefrom, and has urged that the order be affirmed in this court. The question that confronts the court is whether under these circumstances we should simply affirm the order or should reverse with directions to enter judgment dismissing the complaint. It is quite clear that under the statute (sec. 3071) the court has the power to pursue the latter course if it deems such procedure to be advisable. That statute provides that "Upon an appeal . . . the supreme court may reverse, affirm or modify the judgment or order, . . . and may, if necessary or proper, order a new trial." The right to exercise this power does not depend on who takes the appeal. The case being here, the

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court may make any disposition of it that it deems proper. Nevertheless, the rule of practice has long been established in this court that a judgment would not be reversed in favor of a respondent on his exceptions. If he was not satisfied with the judgment, he was obliged to appeal from it to obtain affirmative relief. Except in a few cases a review could not be had by the appellant unless a proper exception was preserved. These rules of practice may now seem narrow, illogical, and highly technical, but perhaps not more so than some of our present-day decisions will appear a few years hence. The cases are not in harmony on the question whether it is necessary to take an exception to an order granting a new trial in order to review it.

The court is of the opinion that any rules of practice heretofore existing which stand in the way of rendering a judgment finally terminating litigation in a case where the record is properly before us and it is apparent that further proceedings could result only in unnecessary expense to the litigants and the public, should, in the interest of the prompt and economic administration of justice, be abrogated. The writer of this opinion somewhat reluctantly concurs in the conclusion reached on this branch of the case. This decision cannot be squared or harmonized with a large number of former decisions, and no attempt at harmony is made. The conflicting cases are simply overruled.

By the Court.—Order reversed, and cause remanded with directions to dismiss the complaint. The respondent, being the prevailing party, is awarded costs in this court.

TIMLIN, J. (*dissenting*). In considering this case I found no reason for reversing the order of the court below. A careful reading of the majority opinion discloses no such reason unless it is desirable to give the respondent more than he claims or to strike the appellant a little harder than he was stricken by the court below, or both. A suggestion in the

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opinion with reference to how those of the future may regard it meets my approval. It is quite a novel view that considerations which make for the affirmance of an order granting a new trial under such circumstances are abhorrent technicalities.

BERGER-CRITTENDEN COMPANY and others, Respondents, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and another, Appellants.

October 28, 1914—January 12, 1915.

Carriers: Contracts: What law governs: Limiting liability: Through contracts: Refusal of connecting carrier to receive freight: Action, tort or contract? Delivery of freight: Embargo, when lawful.

1. In the absence of evidence showing a contrary intent, a bill of lading issued in Illinois is governed by the law of that state as to the nature and validity of the contract, and this includes the question whether a printed clause in such bill of lading limiting the carrier's liability to its own line is binding upon the consignor.
2. Under the law of Illinois as interpreted by its courts, such a limitation is not prohibited, but to make it effective something more is required than merely delivering the freight and accepting a bill of lading with the limitation printed therein; and the same ruling will be applied here in respect to a bill of lading issued in that state.
3. In Illinois, as in this state, the English rule prevails, that the acceptance of freight consigned to a point beyond the line of the first carrier, and delivery of the usual receipt specifying the point of origin of the freight, the terminal point, the connecting line required to complete the transit, and the rate for the entire carriage, constitutes a contract for through service, rendering the initial carrier liable for default of the connecting carrier.
4. Where a railroad company, designated as connecting carrier in a contract of affreightment for a through rate, accepts the freight and demands and receives part of the through rate, and then fails to complete its part of the transit, or where it has held itself out to the public for the performance of such service, or by

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general course of business has authorized the initial carrier to make the through contract, and then refuses to receive the freight from the initial carrier upon some ground inconsistent with its contractual obligations to do so, the wrong constitutes a breach of contract, and both carriers may properly be joined in an action to recover damages therefor.

5. The question whether a particular situation constitutes reasonable cause for a railroad company to refuse to receive freight of a particular kind, or from or for a particular point, may be and generally is one of law; but whether such particular situation exists or not in any given case is generally a question of fact to be decided upon evidence.

6. Mere delivery by a carrier of a carload of freight at the unloading place does not constitute delivery of the subject of transit into the possession of the consignee; the latter being entitled to reasonable time and opportunity to inspect the property and to reject it if rendered worthless or materially injured in transit. Hence, where the consignee had justifiably refused to accept property which became worthless while in transit, the fact that the cars containing such property filled its delivery track did not render it responsible for the blockade so as to warrant the carrier in refusing to accept and deliver other freight shipped to said consignee.

7. After notice of an embargo by a connecting carrier, the initial carrier may accept freight at its own risk of the embargo being actually lifted by the former, or being constructively lifted because of the reasonable basis for it no longer existing, in time for the through transit to be completed.

8. A railroad company must have reasonable ground for instituting an embargo of freight from another carrier, or it is illegal, and if legal when instituted, its continuance becomes illegal when there is no basis for it other than its own culpable negligence.

APPEALS from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action to recover damages for breach of contract of carriage.

December 16, 1909, plaintiffs purchased, at East St. Louis, Illinois, a quantity of water-soaked alfalfa meal. It was required to be kiln dried to save it for use. To that end it was arranged to ship the stuff over the *Alton Railroad* line and that of *Chicago, Milwaukee & St. Paul Railway Company,*

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the two being connecting lines, to Milwaukee, Wisconsin. The agents of both lines knew of the perishableness of the freight. The *Alton Company* received it as routed over the two lines to the desired destination, issuing an appropriate freight bill, containing a printed limitation of its liability for damages to such as might occur on its own line. Plaintiffs' attention was not specifically called thereto. They did not assent to such limitation by delivering the freight and accepting the proper contract without protest. After many cars had been started over the *Alton* line, a few of which duly reached Milwaukee, because of delay in getting cars from the connecting point in the switching district at Chicago, to Milwaukee, plaintiffs directed a diversion to Cragin, Illinois, thinking to have the property treated there instead of at Milwaukee. The nature of the material was such that pretty prompt treatment by drying was necessary to prevent its becoming worthless. Plaintiffs did not make final arrangements therefor at Cragin, Illinois, until some six days after the last of the cars aforesaid were loaded out at East St. Louis,—all of which in due time made the transit of that line. During the delay, twenty-one cars more were loaded out at East St. Louis and likewise duly made the transit of the *Alton* line. There was a bill of lading for each car of the nature aforesaid. This action has reference only to the twenty-one cars. They were routed over the *Alton Railroad* and the *Chicago, Milwaukee & St. Paul* lines, consigned to the American Malting Company at Cragin, Illinois, where plaintiffs designed to receive them. There was conflicting evidence as to the value of the freight when delivered into the care of the *Alton Company*. Prior to the time of the particular shipments cars of the first lot had been placed on the track for the consignees at Cragin, Illinois, but not before there had been considerable delay. None of them had been unloaded. There were several rail connections between the *Alton* terminal and the destination at Cragin, besides the *Mil-*

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waukee line. Plaintiffs did not know of that fact. A reasonable time for movement of freight from East St. Louis to the termination of the transit was about five days. The cars in question were loaded out for the *Alton,* as follows: January 25, 1910, three cars, the next day four cars, the next eight cars, the next one car, and the next five cars. All except one duly reached the termination of the *Alton* transit; but were not taken over by the *Milwaukee* line until March 6, 1910. They were transferred by the latter to the point of consignment the next day. Plaintiffs then refused to receive the freight because it had become worthless in the transit. The delay in the transfer from the *Alton* to the *Milwaukee* line was because, January 25, 1910, the latter notified the former that, until further notice it would not receive cars of alfalfa meal for the American Malting Company at Cragin, Illinois. The reason assigned was blockade of freight. March 2d, thereafter, and before notice of any change, the *Alton Company* was again notified by the *Milwaukee Company* of a freight blockade as to its line, no reason being assigned, and acceptance of the delayed cars conditioned upon prepayment of freight and guaranty of switching charges. Agreeable to the second notice, the *Alton* line assumed the switching charges and guaranteed the freight charges, previously having requested plaintiffs to assume the burden which they refused to do upon the ground that the contract of affreightment entitled them to tender of the freight to the consignee at the place of consignment. At the time of the first notice, the *Milwaukee* line had on its track thirty-eight of the first lot of cars. January 29, 1910, plaintiffs complained to the *Milwaukee* line of its refusal to transfer cars to the consignee and, four days later, received reply that it could not remedy the situation until the consignee cleared its tracks of cars already delivered. Before such reply was received, plaintiffs notified the *Milwaukee* road that they would not receive the freight held on its road, nor pay the freight charges,

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nor clear the track as demanded, because the meal had become worthless in the delayed transit, and requested the company to remove the cars of worthless stuff in order that the later cars, which were still in a condition to be saved, might be set in. Later, as a result of some negotiations, plaintiff unloaded and dried some ten or more cars. There was a conflict as to whether it received the stuff as delivered according to contract, or to minimize damages for which defendants might be liable. The effort to thus save the stuff was not successful and, thereupon, the *Milwaukee Company* was notified that the twenty-one cars which had been held as aforesaid, would not be received nor the freight paid. The meal in those cars was all spoiled before this time.

All matters aforesaid were established, or there was evidence in regard to them. The theory of the plaintiffs was that the freight was received on a through bill of lading, without limit of liability; that the *Alton* line had authority to make such a contract, binding the *Milwaukee Company* thereto; that the latter unreasonably delayed the delivery, and that both companies were liable.

The trial court decided, as matter of law, that the *Milwaukee Company* was justified in declining to receive cars from the *Alton* up to the 3d or 4th of February, 1910, and submitted other matters to the jury for a special verdict, with this result: The alfalfa was worth $4 per ton when loaded out at East St. Louis. The refusal of the *Milwaukee Company* to receive the cars after February 3, 1910, was unreasonable. Before the refusal to unload, the meal became worthless. Plaintiffs were not negligent in loading out their property at East St. Louis faster than it could be duly taken care of on the track of the consignee. They were not negligent in failing to give the *Alton Company* disposition of the meal after notice of inability to make delivery to the *Milwaukee Company,* which proximately contributed to the loss. The meal in one of the cars had no value when it arrived in Chicago.

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The trial court held with plaintiffs as to the limitation clause in the bills of lading being ineffective, and that, under the circumstances, it was entitled to recover of both defendants $4 per ton for the meal in twenty cars, and at the same rate of the *Alton Company* for that in the additional car.

Judgment was rendered accordingly. The defendants separately appealed.

For the appellant *Chicago, Milwaukee & St. Paul Railway Company* there were briefs by *C. H. Van Alstine, H. J. Killilea,* and *Rodger M. Trump,* and oral argument by *Mr. Trump.*

For the appellant *Chicago & Alton Railroad Company* there were briefs by *Quarles, Spence & Quarles,* attorneys, and *I. A. Fish,* of counsel, and oral argument by *Mr. Fish* and *Mr. W. C. Quarles.*

Lawrence A. Olwell, for the respondents.

MARSHALL, J. The primary question presented here is this: Did the trial court err in holding that the clause printed on each of the bills of lading, exempting the initial carrier from liability for damages not occurring on its road, was not a part of the contracts of carriage?

The place of the contract was the state of Illinois and the law of that state governs as to the nature and validity thereof since there was no evidence showing a contrary intent. That is elementary. *International H. Co. v. McAdam,* 142 Wis. 114, 124 N. W. 1042.

Does the proposition stated fall within the field of validity and interpretation,—that of what the real contract between the parties was? In answering this it does not matter, necessarily, what would be our conclusion if the place of the contract was Wisconsin, nor what it would be as an original proposition, as regards an Illinois contract. The courts of that state have settled the law there, that without express assent to a restrictive provision, something other than merely accepting the paper and delivering the freight, as was done in

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this case, such a provision does not become effective and the contract must be read as if it was no part thereof. That seems quite plain from decisions introduced in evidence and others. *Chicago & N. W. R. Co. v. Chapman,* 133 Ill. 96, 24 N. E. 417; *Chicago & A. R. Co. v. Davis,* 159 Ill. 53, 42 N. E. 382; *Wabash R. Co. v. Thomas,* 222 Ill. 337, 78 N. E. 777; *Ill. M. Co. v. C., R. I. & P. R. Co.* 250 Ill. 396, 95 N. E. 492. The written law of Illinois provides that "whenever any property is received by a common carrier, to be transported from one place to another, within or without this state, it shall not be lawful for such carrier to limit his common-law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property." In administering the statute the court early held that it does not prohibit a restriction of common-law liability, but does create a disability to do so by a mere clause in the freight receipt. *Chicago & N. W. R. Co. v. Chapman,* 133 Ill. 96, 24 N. E. 417.

The subject has been reviewed in several courts and by text-writers, as indicated by the authorities cited to our attention, all holding that in Illinois the particular question falls within the field of validity and interpretation,—in short, of that of what the contract is, and not in that of performance or remedy for a breach. *Hoadley v. Northern T. Co.* 115 Mass. 304; *Hartmann v. L. & N. R. Co.* 39 Mo. App. 88; *Powers M. Co. v. Wells-Fargo & Co.* 93 Minn. 143, 100 N. W. 735; 1 Hutchinson, Carr. (3d ed.) § 208.

True, as said by the Massachusetts court in the cited case, what appertains to validity and interpretation and what to mere performance and remedy, is sometimes not easily determined. But the particular matter has been determined by the Illinois court for Illinois contracts, and was, in effect, written into those in question. Such determination has been, in general, followed in other jurisdictions, though con-

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ceding that, as an original proposition, the holding might be different. It is considered that this court should do likewise. Our relations with Illinois are very intimate. Contracts of the kind in question are liable to be very numerous. As said in one of the cited cases, taking issue with the decision of the Massachusetts court, it would be exceedingly inconvenient for contracts made in a state on our borders to mean one thing on one side of the line and a different thing on another. Conceding the logic of the opinion in *Hoadley v. Northern T. Co.*, that there is room in the situation for diverse views, the better policy is to incline, as the Missouri and Minnesota courts did, to the one which obtains and has become, by statutory construction, written law in our border state. We are so inclined and affirm the decision of the court below; thus giving the same construction to the contracts of affreightment as would be given thereto at the place thereof.

The exemption provision in the contracts being out of the case, the next question is whether such contracts were for a through service, rendering the *Alton* road liable for the default of the connecting carrier.

The contract in each case was made by receiving the freight and delivering the usual freight receipt, specifying the point of origin of the freight, the terminal point beyond the line of the receiptor, the connecting line required to complete the transit, and the rate for the entire carriage. As said before, the law of Illinois must be considered as embodied therein; but that makes no difference on this point. Reference to *Schneider v. Evans,* 25 Wis. 241, which did not involve such a contract as the one before us, seems beside the case. It is otherwise as to *Peet v. C. & N. W. R. Co.* 19 Wis. 118, as regards the question before us. The latter with *Tolman v. Abbot,* 78 Wis. 192, 47 N. W. 264, and other cases in this court establish the unwritten law on the subject for this state, substantially following the English rule as to what constitutes a through contract. 4 Elliott, Railroads, § 1434. Other

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courts, including that of Illinois, have followed such rule, though probably, as suggested by Judge Elliott, the majority of courts of this country have adopted what is called the American rule, which is that receipt of goods by one line, destined to a point on the line of a connecting carrier, does not of itself raise an implication of extraterminal liability and, in many jurisdictions, a through rate to the extraterminal point is not enough to change the rule. 4 Elliott, Railroads, § 1435. Illinois has not only adopted the so-called English rule, as it seems, but by statute, as judicially construed, has precluded its disturbance other than by an express contract, as is clearly shown by the cited cases.

So, regardless of what the obligation of a railroad company would be under such a contract as the one in question made in this state, by the law of Illinois the agreement was for a through transit with full common-law liability.

The point is made on behalf of the appellant *Chicago, Milwaukee & St. Paul Railway Company* that if respondents have any cause of action as to such company, it is to redress a wrong sounding in tort, which cannot be joined with proceedings to redress a breach of contract,—the wrong complained of as to the *Alton Company.* There does not seem to be merit in that proposition. It may be that, in general, a mere unreasonable failure of a connecting carrier to receive freight tendered from another road would be a breach of duty, having more the cast of a tortious wrong than a breach of contract. But, where a connecting carrier is not only in duty bound to receive goods so tendered, but holds itself out to the public for the performance of such service, and is designated by the initial carrier, in the contract of affreightment for a through rate, as the connecting line, and the latter assents thereto by force of a custom (1 Elliott, Railroads, § 303; 4 id. § 1443*a*), or by placing refusal to accept the freight upon some ground inconsistent with contractual obligations to do so, or by accepting it and demanding and receiving part

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of the through rate and then failing to complete its part of the transit, the wrong, distinctly, sounds in breach of contract. The holding out involves an offer to receive the subject of carriage and to convey the same over its line. The tender of the freight is an acceptance of the offer. The promise for a promise makes the mutuality of a contract. The actual acceptance of the property by the carrier pursuant to the designation in the agreement with the initial carrier, makes the former a party, to all intents and purposes, to such agreement "bound by the undertaking therein and benefited by the limitations," which are valid. 4 Elliott, Railroads, § 1446 and cases cited. That is the law, in general, appertaining to a bill of lading covering a transit from the origin of the freight to a final delivery point for a through rate by a designated route, covering an initial and connecting carrier. Each line after the first which shall have, expressly, or by general course of business, authorized the initial carrier to make the contract, or which acts upon the designation in affirmance of the initial act, becomes a party thereto. *Railroad Co. v. Androscoggin Mills,* 22 Wall. 594, 601. So it seems the fault complained of as to the connecting carrier here, was of the same nature as that respecting the initial carrier.

The foregoing covers all the questions in the case except those involving matters of fact, requiring jury interference for their solution. All were duly submitted and found in respondents' favor, and the findings have believable evidence and reasonable inferences in their support.

It may be that the learned trial court did not, with consummate definiteness, instruct the jury on the subject of whether the *Milwaukee Company* unreasonably maintained an embargo against receiving the freight from the *Alton* line after February 4, 1910. But it seems that the jury must have understood from the course of the trial that the railroad company had a right to refuse to receive the freight into its possession, if conditions on the delivery track, not attributable

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to its inexcusable fault, were such that it could not promptly place cars thereon and thus terminate its responsibility. No question was raised on the trial as to the right of a railroad company, for reasonable cause, to declare an embargo, as it is called, against receiving freight of a particular kind, or at all, or from or for a particular point. It must be conceded, and is as we understand it, that whether a particular situation constitutes such reasonable cause may be, and generally is, matter of law, but whether such situation existed or not, in any given case, most generally, is matter of fact to be decided upon evidence.

This case was submitted to the jury upon the theory that, if, through fault of the *Milwaukee Company,* a continued occupancy of the delivery track by cars of the first lot, leaving no room thereon for the particular cars, prevented completing the transit until the property therein became worthless, and nevertheless, it refused to make the delivery because of such occupancy, then it committed a wrong. The findings of the jury are to the effect that, from the 4th day of February, 1910, until the property in question became worthless, during which time the cars in question were at the point of transfer to the *Milwaukee Company,* the refusal of the latter to receive the freight and complete the transit was not justifiable,—not justifiable, we understand, by reference to the evidence, because the responsibility for the conditions on the delivery track was with such company. The trial court said in closing the case: "There is much testimony on the question," which is quite true, and further instructed as follows:

"You will remember, gentlemen of the jury, the testimony given by the several witnesses as to what occurred after or at about the 1st of February, and from that until the 3d or 4th day of February, 1910, with reference to the blockade which was declared, it being claimed by the *Chicago, Milwaukee & St. Paul Railway Company* that that blockade was justifiable because cars were upon the industrial track of the American Malting Company and prevented the shipping in or placing

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in of other cars at that time, and was not being disposed of by that company, and for that reason they claim they were entitled to maintain the blockade. You will remember the testimony on the part of the plaintiff by the witnesses and the correspondence with reference to what occurred at or about that time, the direction, if any, which was given to the *Chicago, Milwaukee & St. Paul Railway Company* as to the disposition of those cars, and the effect of such direction, if it was given, may also be considered by you, in determining whether or not it was justifiable, the company claiming that it was justifiable because material upon the track was not being disposed of so as to open the track; on the other side, the plaintiff claiming that it was not justifiable because they had informed them that the material was valueless, that it should be taken out and dumped and permit the other twenty-one cars this suit is about to be moved up and disposed of. Now, you will have that testimony in mind together with all the other facts and circumstances, and all the other evidence that bears upon that question, and answer the question which is here submitted by 'Yes' or 'No.'"

The whole matter was thus plainly placed before the jury. The answer to the question of whether the *Milwaukee Company* was justified in refusing to complete the transit promptly after February 4, 1910, was made to turn on whether it was responsible for the blockade on the delivery track. On the one side it was claimed that the occupancy of such track was by cars of material which had been spoiled in transit and subsequently placed therein by the railroad company, and that respondents refused to receive them on that account and did nothing respecting them except to try and help the railway company out of its dilemma by, at its request, endeavoring, without success, to save some of the freighted property; that it was up to the *Milwaukee Company* from about February 4, 1910, to rescue itself from the situation by dumping such property out of the cars as worthless, or in some way clearing the way for the particular cars, and that it finally did so but too late. There was conflicting evidence in respect to the matter. It was peculiarly a jury

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question. They answered it. The settled practice precludes our disturbing that answer, even if, as an original matter, we would incline to a different result.

It is urged that the cars which blocked the delivery track were occupied by respondents and so they became responsible for the blockade thereon. That is upon the theory that a delivery at the place for unloading is a delivery to the consignee. The authorities cited in support of the proposition, and principle as well, condemn it. It takes something more than mere delivery of a carload of freight at the unloading place to constitute a delivery of the subject of the transit into possession of the consignee. Reasonable opportunity for determining whether the carrier has performed its contract or not is required. If the property is found upon inspection, with reasonable diligence, to have been rendered worthless, or to have been materially injured while in the possession of the carrier, the consignee is not bound to accept the setting out of the car as a delivery of its burden. The consignee is not obliged to accept regardless of condition. He is entitled to reasonable time and opportunity to inspect the property and to reject it if rendered worthless or materially injured in the transit, or to take it without acceptance as having been transported according to contract. 2 Hutchinson, Carr. (3d ed.) § 733; 4 Elliott, Railroads, § 1528. That is elementary. It is laid down, as indicated, by most courts and text-writers. The authorities cited by counsel for appellant *Milwaukee Railway Company* are in harmony therewith.

So it does not follow, merely because the cars which caused the blockade were placed on the delivery track for the consignee, that the responsibility of the railway company, *ipso facto,* terminated, or that it was terminated because of some of the cars having been unloaded by the consignee. If within the reasonable time for inspection, the property was rejected as having been spoiled in transit, and the rejection was persisted in, the consignee only relenting to the extent of ac-

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commodating the railway company in its efforts to minimize the loss caused by its wrongfully delaying the transit, then there was no efficient delivery as regards the claim of respondents in this case.

It is suggested that, as matter of law, the *Milwaukee Company* should not be held liable for damage to material in transit which was accepted by the *Alton Company* after it received notice of the embargo. About half the cars in question were so received. The last of the cars reached the transfer point about the time the embargo should have been lifted. There is nothing to indicate that the *Alton Company* had any reason to expect the necessities of the *Milwaukee Company* would cause any considerable delay, certainly not that delay would be caused by its fault. Had the property accepted for transit after notice of the embargo reached it at East St. Louis, become worthless before termination of justifiable continuance of the embargo, it alone would be liable for the loss. In receiving the cars before notice of termination of the embargo, it took the risk of loss without right of action against the *Milwaukee Company* in case of the latter justifiably refusing to accept such cars at the delivery point until the subject of the transaction became worthless.

When a railroad company, from the reasonable necessities of the situation, having regard to self-protection and duty to the public, declares an embargo, in form, to continue until further notice, or by custom to so continue, it is up to the shipper and initial carrier by reasonable inquiry to find out whether there has been a change in the situation before sending forward freight. *Riddle, Dean & Co. v. B. & O. R. Co.* 1 Int. Comm. Rep. 778. That would hold good until lapse of such time as to render further continuance of the embargo clearly unreasonable; but would not preclude a carrier, circumstanced as the *Alton* was in this instance, from accepting freight for transportation, as here, at its own risk of the embargo being actually lifted by the act of the connecting car-

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rier, or constructively lifted because of the reasonable basis for it no longer existing, in time for the through transit to be completed. The *Alton Company* took that risk in this case. The embargo was constructively lifted February 4, 1910. According to the finding of the jury about such time the twenty-one cars were at the transfer point and their burden, except as to one, was in merchantable condition. So the mere acceptance of the freight by the *Alton Company* and routing it at a through rate over its and the *Milwaukee* line before the latter terminated the embargo, cuts no figure in this case. It is sufficient that it ought to have terminated the interference and received the freight at a time when the transit contemplated should have been successfully completed. The situation is the same as if the *Milwaukee Company* had, on the 4th day of February, 1910, given notice of a termination of the embargo and the *Alton Company* had then accepted the freight from the respondents and made due tender of it to the *Milwaukee Company* to execute its part of the entire transit.

A railroad company must have reasonable ground for instituting an embargo, or it is illegal. The carrier cannot declare an embargo as a shield against its inexcusable fault nor unreasonably continue it as such shield. If legal when instituted its continuance is illegal when there is no basis for it other than its own culpable negligence or wilful neglect. Barnes, Interstate Transp. § 352.

Other questions are suggested by counsel for consideration, some of which are covered by the previous discussion and others are not deemed of sufficient importance, in view of the conclusions already stated, to warrant extending this opinion. The major questions are whether the expressed exemption of liability became a part of the contracts of affreightment, whether the contracts were for a through transit, and whether the *Milwaukee Company* was responsible for the condition which moved it, during the embargo period, to refuse to deliver the twenty-one cars within the period after the 4th of

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February, 1910, before the subject of the transit became worthless. The decision of all in respondents' favor leaves nothing of importance for consideration.

By the Court.—Judgment affirmed on both appeals.

TIMLIN, J., dissents.

MCMILLEN, Respondent, vs. STRANGE, imp., Appellant.

November 18, 1914—January 12, 1915.

Appeal: Review: Findings of fact: Evidence: Sufficiency: Sale of corporate stock: Fraud of purchaser: Confidential relations: Overreaching: Contracts: Construction: Retention by party: Estoppel.

1. Conclusions of fact reached by wrong application of legal principles do not fall within the rule which prohibits this court from disturbing the trial court's findings of fact unless they are against the clear preponderance of the evidence.
2. The fact that one stockholder in a corporation, in negotiating for the purchase of the shares of another stockholder toward whom he sustained confidential relations, made strong representations relative to the lack of integrity and the extravagance of the persons in control of the corporation and the ruinous results which were likely to follow from a continuance of their management, does not justify a finding of fraud in the purchase, where he acted in good faith and honestly and fully believed what he said was true, even though he had exaggerated ideas as to the impending danger.
3. The evidence in this case is *held* not to sustain findings of the trial court to the effect that defendant took advantage of confidential relations existing between himself and plaintiff and by overpersuasion and overreaching induced her to sell certain corporate stock to him; but, on the contrary, to show that in such purchase defendant dealt fairly and honestly with plaintiff and was guilty of no overreaching, unfair, or unconscionable conduct.
4. A contract providing for the purchase of corporate stock, to be paid for within eight years, that it should be held in escrow until paid for, that the dividends should be paid to the purchaser but should be used to pay interest on the purchase money, and that in case of default in making any payment of principal or interest

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the agreement should become void, the deposit be terminated, and the stock returned to the vendor, is construed as giving the vendor an option to declare the contract void in case of default, or to enforce it and collect the purchase price, as she might choose.

5. A privilege reserved in such a contract to pay the entire purchase price before the expiration of the time limited therefor, is not an unusual provision, nor can it be said to be unfair or unconscionable toward the vendor.

6. The law will not permit a person capable of understanding a contract to sign it, retain it, and afterwards avoid it upon the pretext that it was not understood.

APPEAL from a judgment of the circuit court for Winnebago county: W. B. QUINLAN, Judge. *Reversed.*

This action was brought to set aside a sale by the plaintiff to the defendant *John Strange* of 250 shares of the capital stock of the Fox River Paper Company of the par value of $25,000, on the ground of alleged fraud on the part of the defendant *Strange.* The Fox River Paper Company is a Wisconsin corporation engaged in the manufacture and sale of paper at Appleton, Wisconsin. The complaint charges that the plaintiff was induced to make the contract of sale by the false and fraudulent representations of the defendant *Strange* and by undue influence exercised by him upon the plaintiff. The material allegations of the complaint are put in issue by the answer of the defendant *Strange.*

The court below rendered a decision in writing reviewing the evidence and giving its conclusions respecting the facts, and also made findings of fact and conclusions of law.

The contract of sale between the plaintiff and the defendant *Strange,* dated August 4, 1913, provided that the plaintiff sell and deliver her stock in the Fox River Paper Company for $25,000, and that the defendant *Strange* agreed to pay therefor $25,000 on or before eight years from the date of the contract, with interest at six per cent. per annum, payable quarter-annually, and contained the following provisions,

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designated in the decision of the court as paragraphs VII and VIII:

VII. "It is further agreed that all dividends accruing and declared upon such capital stock while same shall be held in escrow as aforesaid, shall be payable to said *John Strange* or his legal representatives, heirs or assigns, but shall be applied by him or them, first, to the payment of the interest accruing and due upon the sums owing and to be paid as aforesaid, and any surplus thereof as he or they shall direct."

VIII. "And it further is agreed that in case of default in the payment of such interest at the times herein stated or in default in the payment of said principal sum as agreed herein or in any of the agreements hereof, this agreement shall be and become void, and said deposit shall thereupon be terminated and said certificates of stock and the instruments of assignment thereof shall become void and shall be surrendered to said *Alice McMillen,* her legal representatives, heirs or assigns."

The contract further provided that the purchase price, principal and interest, was secured by the holding of the stock in escrow by the Oshkosh Savings & Trust Company, defendant herein; that upon the execution of the contract of sale the plaintiff was to make and execute instruments of assignment and transfer of the shares of the capital stock and deposit the same in escrow with said Oshkosh Savings & Trust Company, defendant herein, together with a duplicate of the contract of sale to be held by said Trust Company until the full amount specified in the contract of sale with interest had been paid, and upon payment the stock with the instruments of assignment were to be delivered to the defendant *Strange,* and said *Strange* be thereafter fully discharged of all claims of the plaintiff on account of said purchase money and interest; that the plaintiff was also to execute and deposit with the stock certificates and instruments of assignment proxies authorizing the defendant *Strange* or his legal representatives to vote the shares of stock so deposited at all meetings

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of the stockholders of said Fox River Paper Company, and that said proxies should not be revocable during such period of escrow, and that a duplicate of such proxies be delivered to defendant *Strange* and a like duplicate to the Fox River Paper Company.

The court below found that the plaintiff, when the contract was made, owned the stock in question, which was of the par value of $100 a share, and had owned it since 1901; that in 1899 Katherine, daughter of defendant *John Strange*, married Robert McMillen, Jr., son of plaintiff, and thereafter the plaintiff and her said son and daughter-in-law lived together as members of one family in the plaintiff's home for seven years, and because of said family ties there grew up between plaintiff and the defendant *John Strange* close confidential relations; that as a result thereof defendant *Strange* became the confidential adviser and trusted friend of the plaintiff and her son Robert McMillen, Jr., and plaintiff acted upon defendant *Strange's* advice in making the investment in said 250 shares of stock, and thereafter she depended upon him for information concerning the affairs of the Fox River Paper Company; that the defendant *Strange*, before he became stockholder in the Fox River Paper Company, attended the meetings of the stockholders with his son-in-law, Robert McMillen, Jr., who was an officer and director of the company, and in an advisory capacity took part in the affairs of the company; that after the death of said Robert McMillen, Jr., and about the year 1906 the defendant *Strange* became a stockholder and director of the Fox River Paper Company, and continued as such director until July, 1913, and during said time plaintiff depended upon him for information relating to the affairs of the company; that said company was engaged in the manufacture and sale of paper at Appleton, Wisconsin, and doing a profitable business, and for more than ten years immediately preceding the commencement of this action had declared and paid quarterly divi-

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dends to its stockholders out of the net earnings; that plaintiff received and was paid annually upon her 250 shares of stock between 1901 and 1912 inclusive dividends ranging from $1,500 to $3,000 a year, or about on an average of approximately ten per cent. a year; that the Fox River Paper Company during the time that defendant *Strange* was a director maintained a policy to pay out of the net earnings to its stockholders quarterly dividends amounting in the aggregate to not less than eight per cent. per annum, and during all of said time there was paid annually to its stockholders in quarterly dividends a sum in excess of eight per cent. per annum; that the affairs of the company were so arranged as to keep on hand out of the net earnings a surplus sufficient to declare at least a quarterly two per cent. dividend regardless of business conditions which for any particular quarter might show a loss, or little, if any, profit, all of which defendant *Strange* knew at and prior to August 4, 1913; that the authorized capital stock was $550,000, divided into 5,500 shares of the par value of $100 per share; that 5,406 shares have been issued and are outstanding and the remaining ninety-four shares are held in the treasury; that the value of the assets and property of said company as shown by the books is $1,175,000; that the company is solvent; that it has an enviable reputation in the business world; that the good will is valuable; that the mills belonging to the company are being operated profitably; that since the commencement of this action the regular quarterly dividend of two per cent. has been paid; that in July, 1913, and prior thereto, and on August 4, 1913, and since the shares of stock had a book value of $166 per share, and at said times the cash sale value of said stock was not less than $120 per share, all of which was known to the defendant *Strange;* that prior to the July, 1913, annual meeting of the stockholders there arose some matters of difference between employees, superintendent, and officers; that defendant *Strange* as director advocated changes in the man-

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agement and policy of the company, and at the July, 1913, annual stockholders' meeting he was by vote of a majority of the stockholders defeated as a director; that the changes in directorate at the July, 1913, annual meeting had up to the time of making the findings in no manner injured the company or the value of its stock.

"That the defendant *John Strange* and W. D. Whorton, a director, had been on friendly and intimate terms, and upon the solicitation and request of the defendant *John Strange* the said Whorton wrote to the plaintiff, *Alice A. McMillen*, the letter of July 15, 1913, identified as Exhibit 'A.'

"That on August 1, 1913, and at a time when the plaintiff, because of illness, was in a weakened physical and mental condition and susceptible to the defendant's influence, he took occasion to call at her home, his object and purpose being to secure by personal solicitation and persuasion from this plaintiff her said shares of stock in the Fox River Paper Company, he well knowing that plaintiff regarded said stock as a safe investment and that she had faith and confidence in the business of said company and in the treasurer and general manager of said company, Mr. H. G. Freeman, and well knowing that plaintiff had no desire to sell the same, and that it was not for sale; that plaintiff desired to keep said stock for her three daughters, and that provision had been made that it should ultimately go to plaintiff's said daughters.

"That defendant then and there, in order to induce the plaintiff to surrender said stock to him, and with full knowledge that if he succeeded he would prevent said shares of stock from going where the plaintiff had ultimately designed it should go, took advantage of the friendly and confidential relations then existing, and by overpersuasion and by overreaching on his part, and by reason of the trust and confidence which the plaintiff had reposed in him, induced the plaintiff to agree to let defendant have her said shares of stock.

"That by reason of the defendant's overreaching conduct, and by reason of such confidential relations, he succeeded in producing in plaintiff's mind impressions concerning the condition of the Fox River Paper Company and the necessity for the success of said business that the defendant be in control of the affairs of the company or upon the board of directors.

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"That the defendant exaggerated the importance of the differences between the directors and their effect upon the future success of the company's business; that he represented that the affairs of the Fox River Paper Company were being mismanaged and that salaries far in excess of what were just were being paid to the officers; that the business was going to ruin; that the general manager, Mr. H. G. Freeman, was not earning his salary; that he was at the office of said company attending to business only two hours a day; that Mr. Wagg, the superintendent, was getting an excessive salary, and that he was a thief; that one of Mr. Wagg's sons was drawing a salary of $5,000 a year; that the earning powers of the property were greatly impaired and that there would be no dividends on said stock in the future; that the value of said stock would depreciate until it would be worth but fifty cents on the dollar, and in consequence thereof Katherine McMillen and plaintiff's grandson, Bobbie, would sustain great financial loss.

"That all of the foregoing statements so made to the plaintiff were misleading, and that they created in the plaintiff's mind unnecessary alarm and fear, and because of her weakened and impaired mental and physical condition her judgment was thereby unsettled and she did not have the full and free use of her reasoning faculties and was unable to comprehend fully the transaction, and that through the fear and alarm produced, and believing that the safety of her grandson Robert's and her daughter-in-law Katherine's investment in the stock of the Fox River Paper Company would be greatly impaired and that there was grave and serious danger of financial ruin to them, she carried out the promise so secured by the defendant *John Strange* and executed on August 4, 1913, the agreement and delivered the stock therein mentioned to the Oshkosh Savings & Trust Company.

"That the plaintiff at said time lived in her home in the city of Oshkosh alone with her maid servant, and had always relied upon Mr. George Hilton, an attorney at law of Oshkosh, Wisconsin, to give her advice on business matters, and that she had no acquaintance with any other lawyer in the city of Oshkosh or elsewhere.

"That the plaintiff entered into said contract without taking independent counsel or advice, and that the same was not fully understood or comprehended by her.

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"That the value of said shares of stock was upwards of $30,000.

"That the defendant paid plaintiff nothing whatever, either in cash or property, for said stock, and before the commencement of this action she demanded its return.

"That the plaintiff left with the defendant *John Strange,* by reason of such confidential relations, the procuring of a competent attorney who was to prepare such contract for the sale and delivery of said stock in terms that would be perfectly fair between the parties, and relying upon such relationship she assumed that a contract in accordance with such fairness had been prepared.

"That instead of presenting such a contract to the plaintiff for her signature, the defendant *John Strange* presented a contract to her which was unfair, one-sided and unconscionable, and failed to explain such contract and all of the provisions therein contained, so that when the plaintiff signed the same she did not fully understand the contents thereof nor the effect that certain provisions therein had upon her rights in the transaction."

Judgment was entered upon the findings in favor of the plaintiff, from which this appeal was taken.

For the appellant there was a brief signed by *Silas Bullard,* attorney, and *J. C. Thompson,* of counsel, and a reply brief and oral argument by *Mr. Thompson.*

For the respondent there was a brief by *Bouck & Hilton, E. J. Dempsey,* and *John F. Kluwin,* and oral argument by *Mr. Dempsey* and *Mr. Kluwin.*

KERWIN, J. Many of the material facts in this case are without substantial dispute. The main controversy arises more particularly upon conclusions drawn from facts proved than upon disputed questions of fact.

Where a trial court finds the facts, or the facts are undisputed, and follows such findings or undisputed facts with conclusions contrary to what is legitimately deducible from such facts, to the effect that there was a fraudulent transaction, such conclusions are open to attack and reversal when the con-

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clusions are not properly deducible from the established facts. Conclusions of fact reached by wrong application of legal principles do not fall within the rule which prohibits this court from reversing findings of fact unless against the clear preponderance of the evidence. *Figge v. Bergenthal,* 130 Wis. 594, 109 N. W. 581, 110 N. W. 798.

The learned trial court concluded in its findings of fact that the defendant "took advantage of the friendly and confidential relations then existing, and by overpersuasion and by overreaching on his part, and by reason of the trust and confidence which the plaintiff had reposed in him, induced the plaintiff to agree to let defendant have her said shares of stock." The court below in its decision and upon sufficient evidence acquitted the defendant of any wilful or active fraud, and unless the established facts show that he was guilty of a constructive fraud the judgment below cannot be sustained.

It appears from the record without substantial dispute that Robert McMillen, known in the record as Robert McMillen I, died in 1887, and that his adopted son, known as Robert McMillen II, and George Hilton, an attorney of Oshkosh, Wisconsin, with others since deceased, were named as executors of the will of Robert McMillen I. Robert McMillen I left stock in the Fox River Paper Company of the par value of $200,000, and left surviving him his widow, the plaintiff, and his son Robert McMillen II, and an adopted daughter, Jessie Edmundson, who has two daughters. The Fox River Paper Company operated paper mills at Appleton, Wisconsin; the first was built in 1882, the second in 1888, and the third in 1893. The authorized capital stock of the company was $550,000, $540,000 outstanding and the balance in the treasury. Twenty-five thousand dollars par value of the stock was left under the will of Robert McMillen I to his executors in trust and is held by Mr. Hilton as surviving executor in trust for the adopted daughter, Jessie Edmundson. In the settlement of the estate in 1889 the plaintiff took $25,000 par value

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of the stock of said company from her husband's estate at par; Robert McMillen II received stock of said company of the par value of $141,000. This stock up to 1889 had never paid a dividend, but thereafter and in 1900 paid a dividend of one and one-half per cent. Robert McMillen II succeeded his father as president of the company and married Katherine, the daughter of defendant. Robert II had the advice and services of the defendant, who was experienced in the paper-mill business. Robert McMillen II at his death in 1906 left him surviving his widow, Katherine McMillen, and one son, designated in this case as Robert McMillen III and sometimes called "Bobbie," who is about eight years of age. The defendant is executor of the will of Robert McMillen II. Katherine McMillen holds the $141,000 capital stock of the Fox Rixer Paper Company formerly held by her husband and 150 shares since purchased, and defendant holds in his own name 87 shares and his son Paul 44 shares. After the death of Robert McMillen II the defendant was elected a director of the company, and from 1900 the company paid dividends averaging a little over ten per cent. annually. The company's statement for 1913 shows a surplus account of $225,000, which with the profit and loss account made the book value of the stock over one and one half of par. The company, however, failed to carry any depreciation account until 1909, when it was decided that a proper yearly depreciation was about $25,000, and in 1909, 1910, 1911, and 1912, as appears from the statement of October 1, 1913, the company charged off a depreciation of $98,650. According to the statement the book value of mills and machinery was about $615,000, so it appears that if proper depreciation had been charged off from the time of completion of the last mill built in 1893 down to 1909 the books would show very little surplus. In 1912 and 1913 the first mill, built in 1882, was considerably out of date so far as its capacity to compete with modern mills was concerned; a new filtration system was

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necessary, and for the three mills would cost between $50,000 and $100,000. Mr. Wagg was superintendent and director of the company and Mr. Freeman manager and director. Superintendent Wagg's son was in the employ of the company, and trouble arose with regard to the sale of rubber rags which Wagg's son was purchasing by the carload and selling to the company largely in advance of the market prices. Mr. Whorton, a stockholder, was at this time president of the company, and, after an investigation brought about through defendant, demanded the resignation of Mr. Wagg and his son. The matter was referred to a committee, which at the time of the trial had not reported.

There was evidence going to show that the so-called rag deal was a very substantial loss to the company, although this was denied by Freeman. There was also evidence that the company was selling paper below cost, and that if the same price had been made to all customers that was made to one, there would be a net loss of $40,000 a year. At the July, 1913, meeting the defendant offered resolutions for the purpose of putting the property into shape for successful operation and to provide funds and to adopt a proper system of accounting, and proposed a cutting down of dividends in view of the company's need of new improvements. A mortgage securing a bond issue of $250,000 was authorized. The company's statement of October, 1913, shows $108,000 bonds outstanding, bills payable $111,100, accounts payable over $33,000, labor and salary over $10,000. In April and March, 1913, Wagg sold 150 shares, being all of his stock except six shares, at $120 per share. There is evidence that he formerly offered it at par. It also appears that, allowing a proper amount for depreciation, the profits for 1913 would be very small, if anything. The stock controlled by the defendant, aggregating about $170,000, together with 288½ shares held by the president, Whorton, and 285½ shares held by his stepmother, and the plaintiff's 250 shares, were voted for defend-

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ant, but the stock controlled by Mr. Hilton as trustee for Jessie Edmundson, together with other stock, was voted against the defendant at the July, 1913, meeting, and he was defeated as a director. So it appears that the balance of power of stock at the stockholders' meeting rested with the plaintiff and her adopted daughter, Jessie Edmundson. At this meeting the following directors were elected: Mr. Hilton, whose interest in the company was only that of trustee of Jessie Edmundson's stock; Mr. Wagg, who held but six shares; Mr. Freeman, who held 150 shares, which shortly thereafter he sold to one Wing, who had had but little experience as a practical paper-mill man, but was at the time of trial getting a salary of $4,000 as assistant manager; and Mr. Morrison, who held but one share, his wife, however, owning 250 shares. Mr. Whorton was also elected, but refused to serve as director on account of the defendant being defeated. After Mr. Whorton refused to serve Mr. Witter was elected president. Mr. Witter is interested in paper mills and banks at Grand Rapids, Wisconsin, and it does not appear from the record that he was giving much personal attention to the business of the Fox River Paper Company. Mr. Freeman's salary was reduced from $5,000 to $2,500 after he sold his stock to Wing. The defendant was an experienced paper-mill man and obviously felt that his removal from the board of directors was not in the interest of the company. It was the understanding between plaintiff and defendant that the latter should report from time to time to plaintiff the affairs of the company, and he did so report to her the result of the July, 1913, meeting and his defeat as a member of the board of directors. After this July, 1913, meeting at which he failed to be elected as a director, defendant applied to the plaintiff to purchase her stock.

Plaintiff desired that Mr. Hilton vote her stock and that of Jessie Edmundson for defendant, and had he done so defendant would have been elected a director. Hilton voted

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plaintiff's stock for defendant, but voted the Edmundson stock against him. The defeat of defendant left the stock held by him and his relatives, aggregating about $170,000, unrepresented upon the board of directors. The Whorton interest above referred to, aggregating 574 shares, was also left unrepresented, since Whorton refused to act on the board after the defeat of the defendant *Strange*.

It is quite clear from the evidence that Whorton felt that the board of directors elected at the July, 1913, meeting would not successfully manage the business of the company and that in consequence thereof the stock would be greatly depreciated, and wrote a letter to plaintiff, at the suggestion of defendant, which letter is referred to in the findings as Exhibit "A." In this letter Mr. Whorton speaks in high terms of *Mr. Strange* and expresses surprise that he was voted out of the directory, and saying that at that time in particular *Mr. Strange's* services were needed on the board.

It is true the evidence shows that plaintiff did not wish to sell her stock and offered to give defendant voting power. He answered her by saying that in case of her death the stock might fall into hands unfriendly to defendant's interest. But plaintiff was friendly to the *Strange* interest and desired to protect it, and finally consented to sell the stock and the deal was made.

Now the question in the case is whether there is sufficient evidence to support a finding of fraud. That there was no wilful or active fraud is settled by the evidence and the decision of the trial court. Counsel for respondent make some claim that there was sufficient evidence to support a finding of wilful fraud on the part of the defendant. We have failed to find it.

A very lengthy argument is made by respondent's counsel on the confidential relation existing between plaintiff and defendant and the abuse of it by defendant. True, there was a confidential relation existing between them, and if defendant

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by virtue of the trust and confidence which plaintiff put in him defrauded her he is answerable therefor.

The court below found that on August 1, 1913, the plaintiff because of illness was in a weakened physical and mental condition and susceptible to the defendant's influence, and that the defendant by personal solicitation and persuasion secured her shares of stock in the Fox River Paper Company, knowing that plaintiff regarded the stock as a safe investment; that she had no desire to sell the same, and by overreaching and overpersuasion on the part of defendant and the trust and confidence which she reposed in him was induced to sell; and that the defendant succeeded in producing in plaintiff's mind the necessity of defendant being in control of the affairs of the company or on the board of directors; that he represented that the affairs of the company were being mismanaged and that the salaries paid to officers were far in excess of what was just; that the business of the company was going to ruin; that Wagg, the superintendent, was getting an excessive salary and was dishonest, and that his son was drawing a salary of $5,000; that the earning powers of the property were greatly impaired and that there would be no dividends in the future, and that the value of the stock would depreciate until it would be worth but fifty cents on the dollar, in consequence of which Katherine McMillen and plaintiff's grandson, Bobbie, would sustain great financial loss; that the contract between plaintiff and defendant was not comprehended by plaintiff, was unfair, one-sided, and unconscionable, and the same was not explained to plaintiff, and that she did not fully understand it.

It may well be that defendant had exaggerated ideas as to the impending danger under the directorate elected in July, 1913, but if he was honest in his representations to plaintiff he was not only guilty of no bad faith, but was doing his duty as her confidential friend in reporting to her what he believed to be the truth respecting the affairs of the company.

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That defendant was acting in good faith and believed what he reported to plaintiff is clearly established by the evidence and supported by the decision of the court below. The trial court said in its written opinion in the record:

"The defendant *Mr. Strange* is a man sixty-one years of age, magnetic, with a commanding presence, keen, shrewd, enthusiastic, pugnacious, and persevering; has had a varied and broad business experience; stands high in the business world of the state; has been successful in his undertakings and is considered an authority in the paper-mill business, in which he has devoted much of his time for at least the past ten years; his honor or integrity heretofore, so far as the testimony discloses, has never been questioned."

The trial court further said in its written opinion:

"Before concluding, however, I wish to add that I do not think that *Mr. Strange* ever at any time meant to perpetrate a wilful fraud on the plaintiff as to the consideration, or that the statements made by him to plaintiff concerning the officers' conduct and financial condition of the corporation were anything but what he himself thought were the facts, and that his sole motive in the transaction was to secure the stock because he himself believed it necessary to protect the other stock in which he was interested, but that in his enthusiasm and anxiety to secure the stock from plaintiff he overreached."

The court below further said:

"*Mr. Strange* was considerably wrought up over his treatment by the stockholders and the condition of affairs of the corporation. I have no doubt but what he felt and believed everything he said was the truth, and from what has developed from the testimony I am of the opinion that much of it is the truth; however, from the view I have taken of the questions material to a final determination of the suit, it is not necessary for me to determine whether the statements so made were true or false. It is sufficient that they impressed themselves upon her mind."

We are satisfied from the record that the defendant acted in perfect good faith in the representations which he made to

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plaintiff regarding the affairs referred to and that much that he said was true, and that if any part was not true it was immaterial.

We therefore pass to the proposition, What overreaching or unconscionable conduct on the part of defendant appears in the record which is sufficient to justify the judgment below? It seems that the court below was of the opinion that the contract on its face was unconscionable on account of paragraph VIII set up in the statement of facts, on the ground that this part of the contract gave the defendant the right to suffer a forfeiture to occur, rendering the contract void, and then at his election refuse to perform. This point was pressed in the court below by counsel for respondent here and seems to have been looked upon with favor by the court. After referring to the part of the contract designated as paragraph VIII in the statement of facts the court said: "It is claimed on the part of the plaintiff that this contract is one-sided, inequitable, unfair, and unconscionable." The court then proceeds to define such a contract and says: "Every syllable of paragraph VIII was bristling with unconscionable provisions as to her rights in the transaction. Plaintiff was old, tired." The court below in its decision, in referring to paragraph VIII, further said that the contract gave to *Strange* "an option to buy her stock for eight years at six per cent., with no obligation on his part to take it, but to draw the dividends and do with them as he pleased, and he might at any time during that period default and she would have the stock back on her hands and he the profit to the extent of $1,500 per year if the stock continued to pay twelve per cent.; if not, in whatever sum it would exceed six per cent., and if it paid less than six per cent., or became worthless, or default was made, then turn back the stock." If this construction of paragraph VIII were correct, there would be force in the contention that the contract is unfair and unconscionable. But it is not. The paragraph was favorable to plaintiff, be-

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cause it gave her an option to declare the contract void in case of default or left her free to enforce it and collect the purchase price. *Shenners v. Pritchard,* 104 Wis. 287, 80 N. W. 458; *Meagher v. Hoyle,* 173 Mass. 577, 54 N. E. 347; *Canfield v. Westcott,* 5 Cow. 270; *Chambers v. Anderson,* 51 Kan. 385, 32 Pac. 1098; *Wilcoxson v. Stitt,* 65 Cal. 596, 4 Pac. 629; *Cartwright v. Gardner,* 5 Cush. 273; *Sigler v. Wick,* 45 Iowa, 690.

Complaint is made of the part of the contract designated in the statement of facts as paragraph VII. But with the proper construction of paragraph VIII as before shown, there can be no objection to paragraph VII.

The findings to the effect that the plaintiff, because of her weak condition, was unable to understand the transaction, and that the representations made by defendant created unnecessary alarm in her mind; that the contract was not explained to or fully understood by her, was one-sided and unconscionable, are against the clear preponderance of the evidence. There was nothing unfair or unconscionable in the contract. Paragraphs VII and VIII, properly construed, were fair and unobjectionable. Some complaint is made about a provision in the contract which gave the defendant the right to pay the whole amount before the expiration of eight years, the limit given to make full payment. This is not an unusual provision nor one that can be said to be so unfair as to avoid the contract. It should have been understood by plaintiff and doubtless was. The clear preponderance of the evidence shows that she, though aged, was a bright, intelligent woman and well able to attend to her business. She read the contract and had ample time to examine it. There was nothing complicated about this provision. Any person of the intelligence of plaintiff would understand it upon the most casual reading, and it is not the policy of the law to permit a person capable of understanding a contract to sign it, retain it, and afterwards avoid it upon such pretext.

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Bostwick v. Mut. L. Ins. Co. 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; *Kruse v. Koelzer,* 124 Wis. 536, 102 N. W. 1072.

Some claim is made that plaintiff was not represented by an attorney in the making of the contract. She had an opportunity to select her own attorney. There was some talk as to who should draw the contract. Plaintiff said she did not know the Oshkosh lawyers except Mr. Hilton, and she did not want him because she was displeased with his action in not voting the Edmundson stock for defendant at the directors' meeting, and finally it was agreed that Judge Bullard, of Menasha, should draw the contract, which he did. The defendant saw Bullard, gave him the facts relating to the deal, and Bullard drew the contract, presented it to the plaintiff on Monday, August 4, 1913, gave her a copy which she read, and Bullard also read it to her. There was a blank left in the contract for the amount of the purchase price to be inserted, also a blank for the rate of interest. Plaintiff said she wanted six per cent. interest and it was put in. Also the purchase price, $25,000, was inserted with her consent. The matter was permitted to stand over until the next day, when Mr. Bullard was at Oshkosh and the plaintiff went to the bank, got her papers, and went to the Oshkosh Savings & Trust Company office, met Mr. Bullard, and delivered the stock to said company in compliance with the contract.

It is admitted by counsel for respondent that Judge Bullard is an honest man. He is a reputable attorney in good standing in the state. The evidence shows that he acted with the utmost fairness in the matter and gave the plaintiff opportunity to carefully examine the contract and deliberate upon it before the deal was closed. It appears from the testimony of Judge Bullard that the plaintiff is a bright, capable, comprehending woman and well understood the contract she was signing; that he was somewhat acquainted with her, having

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met her before on different occasions when he was county judge.

Nothing further was heard from plaintiff in the matter until about twenty days after the making of the contract, and she then wrote several letters to defendant asking him to return her stock. Her letters upon this subject were put in evidence and no claim is made in them that she did not understand the contract.

As regards the price, there can be no question. It is established that a blank was left for plaintiff to insert the amount she wished. She knew defendant would pay $30,000 for the stock if she demanded it, but she concluded to sell it for par, what she paid for it, with interest at six per cent. until paid. Whether the stock will appreciate or depreciate depends upon management and the success of the company. It is matter of common knowledge and is clear from the record that the success of the company depends largely upon management. There is no doubt but that defendant believed the company would not be successful under the new directorate. It would seem that Wagg and Freeman shared in this belief because they disposed of their stock except a few shares, and were doubtless more interested in managing the business at good salaries than in owning stock.

Counsel refer to the brilliant success of Wagg and Freeman in the management of the business. It is doubtful whether the record will support this claim. The defendant while director accepted no salary. He was interested in the success of the company only.

We have examined with care the voluminous record in the case. We have been favored by counsel on both sides with able and exhaustive briefs, which we have found very helpful. We are convinced that no case was made against the defendant.

There is no evidence in the record sufficient to support the

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findings and conclusions of the court below. *Boardman v. Lorentzen,* 155 Wis. 566, 145 N. W. 750. On the contrary, the clear preponderance of the evidence shows that in the purchase of the stock in question the defendant dealt fairly and honestly with plaintiff and was guilty of no overreaching, unfair, or unconscionable conduct.

By the Court.—The judgment of the court below is reversed, and the cause remanded with instructions to dismiss the complaint.

SMITH, Appellant, vs. TOWN OF ONALASKA, Respondent.

December 8, 1914—January 12, 1915.

Highways: Duties of superintendent: Diversion of creek: Appraisement of damages.

Secs. 1236–1237*a*, Stats., provide for appraisement of such damages only as are caused by the acts of the superintendent of highways or persons under his direction who enter upon lands adjoining to or near a highway under the authority of said sections for the purposes therein mentioned, but not of the damages caused by any wrongful acts in the improvement of the highway—such as diverting the course of a creek within the limits of the highway—without entry upon any adjoining land.

APPEAL from a judgment of the circuit court for La Crosse county: JAMES O'NEILL, Judge. *Affirmed.*

This is an action to recover damages for an alleged injury to the plaintiff's property caused by the change of the course of a creek by the defendant town in improving a highway.

The plaintiff alleges that he owns and that he and his family occupied as a homestead the northeast quarter of the northeast quarter of section 29, township 16 north, of range 7 west, and that he owned the southwest quarter of the northeast quarter and used it as a pasture lot for his stock. A public highway ran over the west side of the plaintiff's home

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forty and over the east side of the pasture forty, which was diagonally across the road from the homestead. A creek originally ran northwesterly within the limits of the highway at this place. It reached the southwest corner of appellant's home forty and then crossed the highway to a point near the northeast corner of plaintiff's pasture forty, and thence its course was north and west along the highway for a distance of about 1,000 feet, where it recrossed to plaintiff's side of the road and thence flowed on to a field north of the plaintiff's homestead. Originally there was a wooden bridge where the stream crossed the highway near the plaintiff's home, but in the year 1903 the defendant town constructed a stone culvert in place of this bridge. This culvert had a two-foot square opening for the passage of the water. In 1908 the defendant town closed up this culvert and diverted the course of this creek into a ditch along the east side of the road within the limits of the highway, passing along the west side of the plaintiff's home forty, and thereby connected the creek with the old channel where it originally recrossed to the east side of the road. This new creek channel running in front of the plaintiff's home forty separated his home from the traveled track of the highway. The town put in a bridge over the new channel to afford ingress and egress at plaintiff's homestead forty. By conducting the water into this new channel the stream was diverted from crossing the road and from running near the plaintiff's pasture forty.

The plaintiff made application for the appointment of appraisers by the supervisors to assess his alleged damages. They were appointed on August 9, 1910, and on December 5, 1910, they certified that the plaintiff, upon the allegations in his application, had no claim for damages. The plaintiff appealed from this finding to the circuit court and gave his bond as required. Issues were framed by the pleadings of the parties in the circuit court and a trial had thereon.

The plaintiff alleges that he is damaged by this diversion

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of the stream from its natural course in that he is deprived of taking water from the creek for the use of his stock; that he had to build dikes to keep the water from continuously overflowing on his homestead forty; and that his right of ingress and egress was interfered with. The evidence shows that prior and subsequent to the making of this highway improvement this creek overflowed and spread upon plaintiff's lands and adjoining lands at time of high water. Plaintiff claims that he had to move his barn and build dikes around his chicken house on account of the increased flooding of his premises by reason of changing the course of the creek.

The court submitted a special verdict, and the jury found (1) that the liability to overflow was increased by the changes made by the defendant in the course of the creek; (2) that $800 was the damage done to the homestead forty by these acts of the defendant; and that the pasture forty was damaged to the extent of $100. The court, upon motion, changed the answers to these questions in the verdict and awarded judgment dismissing plaintiff's complaint and that the defendant recover its costs. This is an appeal from such judgment.

Wm. S. Burroughs, for the appellant.

For the respondent there was a brief by *George W. Bunge* and *Otto Bosshard,* and oral argument by *Mr. Bunge.*

SIEBECKER, J. The plaintiff claims that he is damaged, as owner of the two forty-acre pieces of land heretofore described, by the action of the town board and the superintendent of highways in changing the course of the creek within the limits of the highway. He instituted proceedings under sec. 1237, Stats., by applying to the supervisors of the town for the appointment of electors to appraise his alleged damages. The required steps under this statute for the appraisement of the damage plaintiff claimed to have suffered were taken and resulted in a determination by the appraisers that

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the plaintiff had sustained no damages. Upon appeal by the plaintiff from such determination the matter proceeded to trial in the circuit court and resulted in a judgment of dismissal of plaintiff's complaint.

The plaintiff contends that he is entitled to recover in this proceeding whatever damages resulted to his property by diverting the course of this creek, within the limits of the highway, pursuant to the order of the town board and the action of the superintendent of highways in making the alleged improvement of the highway in the manner above stated. This contention of the plaintiff cannot be sustained because he claims the right to recover for injuries not embraced in the proceeding provided for in secs. 1236, 1237, and 1237*a*, Stats. Sec. 1236 authorizes any superintendent of highways and persons under his direction ". . . to enter upon any lands adjoining to or near any highway in his town or district and construct such drains or ditches as may be necessary for the improvement or preservation of such highways;" and that he ". . . may enter upon any unimproved lands adjoining to or near any highway in his town or district and gather or dig stones, gravel, sand, clay or loam and cut any wood or trees, and take away the same for the purpose of making or improving any highway. . . ." Sec. 1237 makes provision for "Any owner or occupant of lands so entered upon or used for any of the purposes mentioned in the preceding section," who feels aggrieved, to apply to the supervisors of the town for appointment of three electors to appraise the damages, who shall proceed in the manner prescribed and make report of their appraisement by filing it with the town clerk. Sec. 1237*a* makes provision for an appeal from such appraisement and for a trial of the question of the alleged damages in circuit court. It is manifest that this proceeding was provided for an appraisement of the damages caused in cases where the superintendent of highways or persons under his direction entered upon lands "adjoining to or near any highway in his

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town or district" and constructed drains or ditches thereon or took materials therefrom for the purpose of making or improving highways. The provisions of the statute contain nothing to indicate that this proceeding may be employed by an abutting landowner for the recovery of any damages he claims to have suffered by any wrongful acts of the town board or the superintendent of highways or any persons acting under their direction for the improvement or preservation of a highway. The context of these statutes clearly indicates that they provided a proceeding for the purposes of appraisement only of the damages occasioned by such town officers or agents who enter the private inclosure of premises adjoining to or near a highway under the authority granted by these statutes for the purpose of enabling the owner to secure payment of his damages thereby occasioned. The inquiry is, Did the plaintiff present a case for an appraisement of damages to his lands under the provisions of these statutes? It is admitted without dispute that neither the superintendent of highways nor any person under his direction actually entered upon the plaintiff's land beyond the limits of the highway to construct any drain or ditch or take any material therefrom for the purpose of improving or preserving a highway. The plaintiff asserts that he suffered injury from the acts of the town officers and agents in diverting the course of the creek within the limits of the highway, as specified in the foregoing statement, by depriving him of the use of the water in the creek near his pasture forty and by increasing the liability of flooding his lands in case of high water and by injuring his facility of ingress and egress. These alleged injuries are not the result of any entering on or taking of material from his lands within the contemplation of the provisions of these statutes under which the plaintiff proceeded for an appraisement of his damages. We have examined the evidence and find the circuit court correctly applied the law upon motion after verdict, by directing a judgment in defendant's

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favor, notwithstanding the verdict, upon the ground that the evidence failed to show that plaintiff had any right to recovery under the provisions of sec. 1236, Stats.

By the Court.—The judgment appealed from is affirmed.

STATE EX REL. WENDLING, Appellant, vs. BOARD OF POLICE AND FIRE COMMISSIONERS OF THE CITY OF LA CROSSE, Respondent.

December 8, 1914—January 12, 1915.

Municipal corporations: Removal of police officer: Power of police and fire commission: Charges, by whom to be filed.

1. In a proceeding under sec. 959—45, Stats. 1913, for removal of a member of the police or fire department in a city of the second or third class, the board of police and fire commissioners can act only upon written charges filed by the chief of the department or by an elector of the city.
2. Where an administrative tribunal of limited jurisdiction is by a fair construction of the statute giving it authority required to act upon written charges made by designated persons, action in the absence of such charges is without jurisdiction and void.
3. Suspension is an *ad interim* stoppage or arrest of official power and pay. Removal terminates wholly the incumbency of the office or employment.

WINSLOW, C. J., and VINJE, J., dissent.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Baldwin & Bosshard,* and oral argument by *C. L. Baldwin.*

For the respondent the cause was submitted on the brief of *J. E. Higbee.*

TIMLIN, J. The appellant, a member of the police force, was removed for misconduct by the respondent board, acting

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under sec. 959—45, Stats. 1913. Upon *certiorari* to the board their order was affirmed, and from the judgment of the circuit court in the latter proceeding the appeal to this court is taken.

Two points are made for reversal: (1) that no charges in writing were filed either by the chief of police or by an elector of the city against the appellant, but the board acted as complainant, or, in other words, filed the charges on its own initiative and in its own behalf; (2) the board failed to reduce to writing and preserve any of the evidence on which it acted.

The appellant was not an officer nor had he any fixed tenure of place, but held a position as policeman during good behavior and at the pleasure of his superior, who had the power of appointment, except as this condition was changed or modified by statute. Sec. 959—45 first provides that in suspending a chief officer of either department the board may act on its own initiative or upon written charges made by any qualified elector of the city and filed with the president of the board. Pending investigation of such charges made by a qualified elector the board may in its discretion suspend any such chief officer. But no chief officer shall be removed from his office unless written charges shall be filed and an opportunity be given him to be heard in his defense. As we understand this, the action of the board on its own initiative does not rest upon written charges and extends only to suspension. The statute then interposes the broad negative that no such chief officer shall be *removed* from his office unless written charges shall be filed and an opportunity given him to be heard in his defense. The foregoing is valuable in the instant case only because *in pari materia* with what follows.

The appellant was not a chief officer. Sub. 2 of sec. 959—45 provides that every other officer or member of either department shall be subject to suspension for cause by the chief of the department or by the said board. What, if anything, should follow suspension by the board is not expressly provided. But it is declared that if suspension is made by the

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chief officer, the latter shall report the same with the cause of such suspension to the president of the board and the board shall thereupon proceed to examine the charges against such suspended person, giving him an opportunity to be heard in his defense. The action of the board on this hearing must be to reinstate the member immediately, to suspend him temporarily, or to remove him from the office or employment, and the difference between temporary suspension and removal is thereby recognized. It is then provided that any qualified elector of the city may also file written charges against any member. These charges shall be investigated by the board in the same manner that charges by the chief officer are required to be investigated, and pending the investigation of any such charges the board may suspend the person against whom such charges are filed. This again accentuates the difference between suspension and removal. Suspension is an *ad interim* stoppage or arrest of official power and pay. Removal terminates wholly the incumbency of the office or employment. Sub. 3 provides that every person against whom charges are made shall be entitled to a copy of such charges and shall be given an opportunity to be heard in his own defense and the hearing shall be public. The complainant and the person against whom charges are filed may each be represented by an attorney. Each may compel the attendance of witnesses by subpœna. Sub. 4 provides that when any person against whom charges are made shall be convicted and the board shall decide to remove such person, such removal shall be made by an order of the board to that effect to be entered in their records. Sub. 5 provides that the decision of the board shall be final and conclusive.

We think the mere power given to the board to suspend on its own initiative is to be exercised summarily and without filing any charges. But when the more serious proceeding of removal is attempted written charges must be filed, and they must be filed by the chief of police or by any elector of the city. The person making the charges is to assume an adver-

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sary attitude toward the accused and may employ an attorney to prosecute these charges. The board is nowhere expressly authorized to file charges for removal, to prosecute these charges, and to sit in judgment thereon. The statute does not seem to contemplate any such anomalous proceeding. Notwithstanding the broad power given to the board in other respects, we think a fair construction of this statute leads to the conclusion that in a proceeding for removal the board can only act on written charges filed by the chief of the fire or police department or by an elector of the city. No doubt it would be competent for the legislature to provide that the board might remove without charges or even without cause, or might file charges to be heard before themselves, but the legislature has not seen fit to do so. We think the implications of the statute are to the contrary. The statute is of very doubtful wisdom, but that is not a matter for our consideration. It seems to be framed on the theory of diminishing the authority of the chiefs of the departments mentioned over the members of these departments and giving the latter a right to question before this board any attempted removal or discharge. The statute in thus attempting to secure a hearing and determination must be considered to have in contemplation the hearing before an impartial tribunal; a hearing in the nature of a lawsuit or legal inquiry in which the accuser and the defendant stand as adversary parties and the board as judge and jury. It was apparently not thought necessary to require this in case of suspension. The writing filed in this case is somewhat in the nature of a citation and might perhaps be taken not to be a charge made by the board but by a qualified elector, were it not that the statute requires the charge to be in writing. This paper said:

"The *Board of Police and Fire Commissioners* for the city of La Crosse have been informed that on the night of January 16th or thereabouts Night Sergeant *Wendling*, while on 'duty," did, etc., etc. . . . "You . . . will take notice that the board . . . will meet at . . . for the purpose of investigating said charges, at which time and place you may appear

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with attorney if you so elect, and make such answer to the charges as you may be advised."

This document was signed by the *Board of Police and Fire Commissioners.* We must consider it, therefore, charges upon information and belief made by this board against the appellant which put the board in the position of an adversary entitled to employ an attorney to prosecute and at the same time invited the appellant to an impartial hearing. We consider that the statute upon a fair construction thereof not only fails to authorize, but prevents, the board from proceeding in this way in case of a removal by specifying other persons who are to make the charges in such case and by conferring upon the prosecutor powers and upon the board duties inconsistent with such construction of the statute.

It is quite elementary law that where an administrative tribunal of limited jurisdiction is by a fair construction of the statute giving it authority required to act upon written charges made by designated persons, action in the absence of such charges is without jurisdiction and void. *Thompson v. Milwaukee,* 69 Wis. 492, 34 N. W. 402; *Verbeck v. Verbeck,* 6 Wis. 159; *Appeal of Royston,* 53 Wis. 612, 11 N. W. 36; *Damp v. Dane,* 29 Wis. 419; *Canfield v. Smith,* 34 Wis. 381; *McVichie v. Knight,* 82 Wis. 137, 51 N. W. 1094; *Crawford Co. v. Le Clerc,* 3 Pin. 325; *St. Sure v. Lindsfelt,* 82 Wis. 346, 52 N. W. 308.

It follows that the circuit court erred in refusing to vacate the order of the police and fire commissioners. This disposes of the case, and it is not necessary to consider the second point made by the appellant, and we express no opinion upon it.

By the Court.—Judgment reversed, and the cause remanded for further proceedings according to law.

The following opinion was filed February 8, 1915:

WINSLOW, C. J. (*dissenting*). I think this decision is to be regretted. A police force is much like a military force

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and needs the most perfect discipline in order to be efficient. There can be no discipline worthy of the name where the supreme governing board is powerless to remove a member of the force on its own initiative.

It seems to me very clear that the first subdivision of sec. 959—45 gives to the defendant board the power not only to suspend but to remove the chief officer of either the fire or police department on its own initiative or upon the initiative of an elector of the city. If this be true, then it seems to me inconceivable that it was intended by the second subdivision of the section to deny the board the power of removal on its own initiative in case of a mere member of the force. I admit the rather unsatisfactory wording of this last named subdivision, but it is certain that it gives the board the same power of suspension on its own initiative as is given by the first subdivision in case of the chief officer. It then provides for suspension by the chief of the department and for suspension by the board pending a hearing upon charges made by a taxpayer, and specifies the powers and duties of the board in investigating the charges and making an order of removal in either of the last named cases. Nothing is said about the method of removal in case of suspension on its own initiative. Is it to be supposed from this that the legislature intended that such a suspension should be indefinitely hung up and never be followed by trial, vindication, or condemnation until the chief of the department or a qualified elector chose to present charges?

The idea seems to me impossible. Evidently the legislature did not deem it necessary to make more specific provision as to the powers of the board in case of suspension on its own initiative. That power was assumed to exist as a natural result or corollary of the general powers specifically given, as well as of the fact that the commission was the supreme governing power and needed no special grant.

VINJE, J. I concur in the foregoing dissenting opinion of Mr. Chief Justice WINSLOW.

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KLOOZ, Respondent, vs. HOOD, Appellant.

December 8, 1914—January 12, 1915.

Ejectment: Who may maintain.

One in peaceable possession of land under a claim of ownership, even if in fact he has no title, may maintain ejectment against a mere trespasser who intrudes upon such possession.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

C. L. Hood, for the appellant.

For the respondent there was a brief by *Geo. W. Bunge* and *Otto Bosshard,* and oral argument by *Mr. Bunge.*

BARNES, J. This case was before the court on a former appeal and is reported in 150 Wis. 208, 136 N. W. 641. A plat is there reproduced showing the parcel of land in dispute. The plaintiff claimed that the west boundary line of lot 10 should be located as shown on the plat and the defendant claimed that it should be several feet further east. On the first appeal it was held that plaintiff had shown title by adverse possession to the disputed strip. On the last trial the court found on sufficient evidence that the original boundary line was located as claimed by the plaintiff, and also that plaintiff had been in possession of and used and occupied the strip in question for more than twenty years. The defendant appeals from a judgment awarding title and possession to the plaintiff. The finding as to the location of the true line concededly eliminates all of the parcel involved from further controversy, except the portion of it lying within the ten-foot strip to the north of the north boundary line of block 1, this parcel being about ten feet long from north to south and about six feet wide from east to west. As to this strip, neither of the parties owns the record title.

It is the contention of the defendant that on the last trial the plaintiff wholly failed to prove any use, occupancy, or pos-

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session of the parcel prior to 1898, and that, plaintiff not having the record title or title by adverse possession for the statutory period, the judgment is wrong.

The plaintiff owned the west half of lot 10 and built a small barn on the northeast corner of it in 1888. This barn was extended to the west and considerably enlarged in 1898. After that time the plaintiff used the parcel now in dispute. We do not find any satisfactory evidence that plaintiff actually used it before that time, although she did use most of the ten-foot strip lying to the north of her lot. We do not find it necessary to decide whether such use and occupation was sufficient to give title by adverse user to all of the strip lying adjacent to her lot.

It is settled that plaintiff was and had been in peaceable possession under a claim of ownership at least when defendant intruded and placed his barn where it is. He was a trespasser, and conceding that she was also when she made her entry, she was entitled to continue her possession as against the defendant and might bring an action of ejectment against him to recover such possession. *Bates v. Campbell,* 25 Wis. 613; *Ill. S. Co. v. Budzisz,* 106 Wis. 499, 521, 82 N. W. 534; *Elofrson v. Lindsay,* 90 Wis. 203, 206, 63 N. W. 89; *Swift v. Agnes,* 33 Wis. 228, 240; *Hammer v. Hammer,* 39 Wis. 182, 187.

This rule of law in no way conflicts with the other well recognized rule, that, where a plaintiff in an ejectment action relies on title to establish his right of recovery, he must depend on the strength of his own title and not on the weakness of the title of his adversary.

By the Court.—Judgment affirmed.

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CURTIS, Appellant, vs. MODERN WOODMEN OF AMERICA, Respondent.

December 8, 1914—January 12, 1915.

Life insurance: Mutual benefit societies: By-laws subsequently adopted, when binding: Forfeiture: Death caused by use of intoxicants.

1. **A stipulation in a mutual benefit certificate that the insured shall be bound by by-laws thereafter adopted is valid, and such a by-law will be binding upon him if the change made thereby is simply a change in a matter of detail deemed necessary or advisable to carry out the fundamental principle or plan of insurance, and not a change in a substantial part of the plan itself or a nullification of the existing insurance contract.**
2. **Thus, under such a stipulation, a subsequently adopted by-law providing that if any member "heretofore or hereafter adopted shall become intemperate . . . or if his death shall result directly or indirectly from his use of intoxicating liquors," his certificate shall become null and void, is valid and binding upon the insured and the beneficiary.**
3. **Such by-law provides for two separate and distinct contingencies in which the certificate shall become void: (1) where a member becomes intemperate after the passage of the by-law, and (2) where a member's death results directly or indirectly from his use of intoxicating liquors, regardless of the time when his intemperance began.**

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action by the beneficiary named in a benefit certificate for $3,000 issued by the defendant upon the life of one Frank H. Curtis, plaintiff's brother. The action was tried by the court. The essential facts are these: The defendant is a fraternal benefit association insuring its members on the assessment plan. It accepted the said Frank H. Curtis as a member April 19, 1892, and issued to him a benefit certificate. This certificate was surrendered May 13, 1902, and a new certificate issued naming the plaintiff as beneficiary, and containing the condition that if the insured became intemperate in the

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use of alcoholic drinks or in the use of drugs or narcotics the certificate should become null and void; also the further condition that the certificate should be subject to forfeiture for any cause or causes then prescribed by the by-laws or which might thereafter be prescribed by the society, by amendment of the by-laws. Frank H. Curtis died April 6, 1913, of delirium tremens due to the intemperate use of intoxicating liquors. About the year 1898 the said Curtis became intemperate in the use of alcoholic drinks and continued so for years to the knowledge of the officers of the local camp or lodge, of which he was a member. The assessments on the certificate continued to be regularly paid, however, and the local camp continued to receive them and transmit them to the head or governing camp. The by-laws provided that no local camp or officer thereof should have power to waive any provision of the by-laws. The head camp never knew that the deceased was intemperate prior to his death. September 1, 1911, the defendant enacted a by-law providing that if any member "heretofore or hereafter adopted" should become intemperate in the use of intoxicating liquors . . . or if his death should result directly or indirectly from the use of intoxicating liquors, then his certificate should become null and void. The assessments on the certificate were fully paid up to the time of the death of the insured. The trial court held that there could be no recovery and dismissed the complaint, and the plaintiff appeals.

For the appellant there was a brief by *Gilbert & Ela,* and oral argument by *Emerson Ela.*

For the respondent there was a brief by *Truman Plantz* and *Kroncke, Sauthoff & Murphy,* and oral argument by *George Kroncke.*

WINSLOW, C. J. We find it unnecessary to decide the question whether the continued receipt of assessments by the local camp with knowledge of the continued intemperance of

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the insured and the forwarding of the same to the head camp, together with their retention by the head camp, constituted a waiver of the condition as to intemperance contained in the original by-laws.

The following propositions necessitate affirmance of the judgment:

1. A stipulation contained in the certificate of insurance in a mutual benefit society that the insured shall be bound by by-laws thereafter adopted is valid, and any such by-law will be binding upon the insured provided that the change made by the new by-law is simply a change in a matter of detail deemed necessary or advisable to carry out the fundamental principle or plan of insurance, and not a change in a substantial part of the plan itself or a nullification of the existing insurance contract. *Hughes v. Wis. O. F. M. L. Ins. Co.* 98 Wis. 292, 73 N. W. 1015; *Loeffler v. Modern Woodmen,* 100 Wis. 79, 75 N. W. 1012; *Wuerfler v. Trustees Grand Grove,* 116 Wis. 19, 92 N. W. 433; *Jaeger v. Grand Lodge,* 149 Wis. 354, 135 N. W. 869.

2. The by-law adopted September 1, 1911, simply made a change in the execution of the plan of insurance and not a change in the fundamental principle or plan, nor did it nullify any existing contract; hence it was valid and binding on the insured and the beneficiary.

3. The said by-law provided for two separate and distinct contingencies in which the certificate should become void, viz.: (1) where a member becomes intemperate after the passage of the by-law, and (2) where a member's death results directly or indirectly from his use of intoxicating liquors regardless of the time when his intemperance began. The insured in the present case was clearly included in the second class.

By the Court.—Judgment affirmed.

KERWIN, J., took no part.

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DE PAS, by guardian *ad litem,* Appellant, vs. SOUTHERN WISCONSIN RAILWAY COMPANY, Respondent.

December 8, 1914—January 12, 1915.

Street railways: Injury to person boarding car: Contributory negligence: Evidence: Admissibility: Special verdict: Harmless errors.

1. **In an action for injuries sustained in attempting to board a street car, the evidence being ample to sustain the jury's finding that plaintiff was guilty of contributory negligence, the exclusion of evidence which, even if admissible, could have had only a remote and inconsequential bearing on that question, was not prejudicial error.**
2. **It was not improper in such case to submit in the special verdict a question as to whether plaintiff ought to have seen that the door of the car was closed before she attempted to board the car—its purpose being to ascertain whether or not she was a passenger when injured; and even if erroneous such submission was not prejudicial, since it could not have influenced the jury in answering the question as to contributory negligence.**

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to recover damages for injuries alleged to have been sustained by plaintiff in attempting to board one of the defendant's street cars. The complaint alleged that on December 28, 1912, at about 8:25 in the evening, the plaintiff attempted to board one of defendant's cars while it was standing at the terminal at South Madison; that she reached for the handle on the right-hand side of the rear entrance to the car, and as she grasped the handle and was about to step upon the car the motorman, without any notice or warning, started the car suddenly and plaintiff was thrown violently against the right rear door, which door the defendant's employees in charge of the car had closed and allowed to remain closed; that plaintiff held onto the handle, with one knee on the step, and was carried for a distance of about thirty feet, when the car

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was stopped. The answer of the defendant denied the allegations of negligence on defendant's part and alleged contributory negligence on the part of the plaintiff. The following special verdict was returned by the jury:

"(1) Did the plaintiff have her foot on the car step and her hand on the car handle before the car started? *A.* Yes.

"(2) Did the car start with a sudden and unnecessary jerk at the time plaintiff was injured which threw her against the rear door of the car? *A.* Yes.

"(3) Was it the general custom to have the right-hand rear door of this type open when the car was ready to receive passengers and while it was in motion? *A.* Yes.

"(4) If you answer questions 2 and 3 or either of them 'Yes,' was the defendant or its agents guilty of want of ordinary care in starting the car or in keeping the right rear vestibule door closed? *A.* Yes.

"(5) If you answer question 4 'Yes,' was such want of ordinary care the proximate cause of injury sustained by the plaintiff? *A.* Yes.

"(6) Was the plaintiff guilty of any want of ordinary care in attempting to board the car which proximately contributed to produce the injury sustained by her? *A.* Yes.

"(7) Ought the plaintiff in the exercise of ordinary care to have seen that the door of the car was closed before she attempted to board the car? *A.* Yes.

"(8) What sum will compensate the plaintiff for the injury sustained by her on the car of the defendant on December 28, 1912? *A.* ——."

Judgment was entered dismissing the complaint, and from such judgment plaintiff appeals.

For the appellant there was a brief by *Welton & Marks,* and oral argument by *C. E. Marks.*

For the respondent there was a brief by *Jones & Schubring,* and oral argument by *E. J. B. Schubring.*

Barnes, J. The appellant argues that the court erred (1) in excluding testimony to the effect that shortly after the accident the conductor stated that if he had been where he

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ought to have been the accident would not have happened and that it was his fault; (2) in excluding certain rules of the defendant pertaining to the starting of cars, the handling of bell-cords, and the position to be occupied by conductors; (3) in not holding as a matter of law that the plaintiff was not guilty of contributory negligence; and (4) in including question 7 in the special verdict.

The evidence was ample to sustain a finding of contributory negligence. The first item of evidence was excluded because it was not part of the *res gestæ,* and the second because the complaint did not charge negligence of the conductor. If the very doubtful proposition, that the evidence was proper, be conceded, we do not see how it could have anything more than a remote and inconsequential bearing on the plaintiff's contributory negligence, and she was not prejudiced on this issue by the rulings complained of. This finding being fatal to her recovery, errors committed on the trial of other issues not affecting this one became immaterial. There was no impropriety in submitting the seventh question. Its purpose was to ascertain whether or not the plaintiff was a passenger when injured. If the question was correctly framed, its answer would affect the degree of care which the defendant was bound to exercise. On no theory can we see how the submission of the question could influence the jury in arriving at a conclusion on the contributory negligence of the plaintiff.

By the Court.—Judgment affirmed.

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HEWITT, Respondent, vs. SOUTHERN WISCONSIN RAILWAY COMPANY, Appellant.

December 8, 1914—January 12, 1915.

Appeal: Review: Questions for jury: Street railways: Injury to passenger: Sudden starting of car: Negligence: Contributory negligence: Evidence.

1. The decision of the trial court as to whether the evidence presents a jury question will not be disturbed on appeal unless it appears to be clearly wrong.
2. Where the evidence raises a jury question and the trial court has refused to exercise its discretion to grant a new trial, the findings of the jury are conclusive.
3. Upon evidence tending to show that when plaintiff, who was carrying a child upon one arm and a heavy package under the other, reached a point just inside the door of one of defendant's pay-as-you-enter street cars, she was required to deliver her fare; that as she was trying to get the money from her glove the conductor signaled for the car to start, and it started suddenly with a violent jerk, by reason whereof she fell backward on the platform and was injured; that no effort had been made to assist her; and that there were no handholds within her reach by which she could have guarded against being thrown down, the questions of negligence on the part of the defendant and contributory negligence on plaintiff's part were properly for the jury.
4. The evidence in such case must be viewed in the light of the duty of the defendant to exercise the highest degree of care for the safety of passengers reasonably to be expected from human vigilance and foresight in view of the mode and character of the conveyance adopted, and consistent with the practical operation of the business.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to recover for a personal injury.

Defendant operated electrically propelled pay-as-you-enter cars. In starting a car from a position of rest, there was, commonly and necessarily, a sudden movement, rendering exercise of care necessary by one standing in a car to avoid danger of losing safe self-control. Plaintiff knew that. She

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was a woman thirty years of age on the occasion in question. It was customary for a car conductor to stand inside the door of his car to receive from passengers their fare before being seated. Plaintiff knew that. On February 25, 1913, she boarded one of such cars, accompanied by two little girls, one three and the other seven years of age. On one arm she carried the youngest girl and the other was engaged in carrying a fifteen-pound package of kalsomine. As thus incumbered, when she reached a point just inside the car door, she was required to deliver her fare. The conductor signaled quickly for the start as she was endeavoring to procure the money for her fare from the glove on her left hand. She had just stepped over the threshold of the door and had not prepared herself in any way to guard against being disturbed by the sudden forward movement which she knew was imminent. The conductor gave the start signal which was obvious to her. The motorman obeyed. The car started with a jerk and she fell backward through the door onto the platform and was injured. There was testimony proving, or tending to prove the foregoing and that several passengers boarded the car ahead of plaintiff; that her movements were slow because of her being incumbered as indicated; that she delayed the car somewhat; that the car was started with considerable of a jerk,—probably was accelerated to make up for delay; that no effort was made to assist her, and that there were no handholds within her reach by which she could guard against being thrown down.

The court submitted the case to the jury for a special verdict. The questions covered all the issues suggested by the evidence, including whether the car was started with an unusual jerk, whether plaintiff, under the circumstances, was permitted to occupy a safe place while endeavoring to pay her fare, and whether she was guilty of contributory negligence. All the questions were answered in her favor and her

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damages were assessed at $1,000. Judgment was rendered accordingly.

For the appellant there was a brief by *Jones & Schubring*, and oral argument by *E. J. B. Schubring*. They contended, *inter alia*, that evidence of a fall in a street car does not show a negligent starting, nor does testimony describing the starting as a "violent jerk" or as a rapid forward movement constitute evidence of a negligent starting of the car. *Boston E. R. Co. v. Smith*, 168 Fed. 628; *Tupper v. Boston E. R. Co.* 204 Mass. 151, 90 N. E. 422; *Sauvan v. Citizens' E. St. R. Co.* 197 Mass. 176, 83 N. E. 405; *Work v. Boston E. R. Co.* 207 Mass. 447, 93 N. E. 693; *Foley v. B. & M. R. R.* 193 Mass. 332, 79 N. E. 765; *Graf v. W. J. & S. R. Co.* (N. J.) 62 Atl. 333; *Dawson v. Maryland E. R'y*, 119 Md. 373, 86 Atl. 1041; *Conroy v. Detroit U. R'y*, 139 Mich. 173, 102 N. W. 641; *Ottinger v. Detroit U. R'y*, 166 Mich. 106, 131 N. W. 528; *Rhea v. Minneapolis St. R. Co.* 111 Minn. 271, 126 N. W. 823, 824; *Augusta R. & E. Co. v. Lyle*, 4 Ga. App. 113, 60 S. E. 1075; *Vincent v. New Orleans R. & L. Co.* 134 La. 654, 64 South. 654. The starting of the car before plaintiff had reached a seat was not negligence. *Sauvan v. Citizens' E. St. R. Co.* 197 Mass. 176, 83 N. E. 405; *Tupper v. Boston E. R. Co.* 204 Mass. 151, 90 N. E. 422; *Herbich v. North J. St. R. Co.* 65 N. J. Law, 381, 47 Atl. 427; *Ayers v. Rochester R. Co.* 156 N. Y. 104, 50 N. E. 960, 961; *Boston E. R. Co. v. Smith*, 168 Fed. 628, 633; *Ottinger v. Detroit U. R'y*, 166 Mich. 106, 131 N. W. 528. The rule of law is well settled in Wisconsin that where the conduct of the defendant coincided with the customary method of doing business of others under similar circumstances, no inference of negligence can arise from such conduct. *Bandekow v. C., B. & Q. R. Co.* 136 Wis. 341, 343, 117 N. W. 812; *Prybilski v. N. W. C. R. Co.* 98 Wis. 413, 416, 74 N. W. 117; *Boyce v. Wilbur L. Co.* 119 Wis. 642,

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648, 97 N. W. 563. The absence of additional appliances, handholds, or supports does not constitute negligence. Any additional handholds would not have been of any use to the plaintiff, and their absence cannot be negligence on the part of the defendant. The absence of additional handholds, therefore, was not the proximate cause of plaintiff's fall. There is no causal connection between the absence of additional handholds and the injury. *Stock v. Kern,* 142 Wis. 219, 222, 125 N. W. 447.

For the respondent there was a brief by *Henry Casson,* attorney, and *Sanborn & Blake,* of counsel, and oral argument by *C. E. Blake.* They argued, among other things, that proof that a street car started with "something more than ordinary jerking" may establish negligence. *Otto v. M. N. R. Co.* 148 Wis. 54, 57, 58, 134 N. W. 157; *Memphis St. R. Co. v. Huggins,* 215 Fed. 37; *Bell v. N. Y., N. H. & H. R. Co.* 217 Mass. 408, 104 N. E. 963; *Birmingham R., L. & P. Co. v. Hawkins,* 153 Ala. 86, 44 South. 983; *White v. Columbia & M. E. R. Co.* 215 Pa. St. 462, 64 Atl. 676; *Winona & W. R. Co. v. Rousseau,* 48 Ind. App. 248, 93 N. E. 34, 1038; *Sheffer v. L., H. & St. L. R. Co.* 22 Ky. L. Rep. 1305, 60 S. W. 403; *Bobbitt v. United R. Co.* 169 Mo. App. 424, 153 S. W. 70. The defendant was also negligent in not supplying the plaintiff with a safe place in which to stand and in failing to provide her with additional handholds, appliances, or supports while paying her fare. In this jurisdiction the standard of care in operation and construction required by a common carrier of passengers has been defined in *Ferguson v. Truax,* 136 Wis. 637, 643, 118 N. W. 251; *S. C.* 132 Wis. 478, 490, 110 N. W. 395, 111 N. W. 657, 112 N. W. 513; *Dibbert v. Metropolitan Inv. Co.* 158 Wis. 69, 147 N. W. 3; *Wanzer v. Chippewa Valley E. R. Co.* 108 Wis. 319, 84 N. W. 423. It was negligence for defendant to start the car before plaintiff gained a seat or place of safety. It is the duty of the carrier, where the passenger is obviously

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feeble, infirm, crippled, hampered with children, etc., to see that he or she reaches a seat or other place of safety before starting the car. *Brady v. Springfield T. Co.* 140 Mo. App. 421, 124 S. W. 1070, 1072; Nellis, Street Railways, § 301; *Sheffer v. L., H. & St. L. R. Co.* 22 Ky. L. Rep. 1305, 60 S. W. 403; *Bennett v. Louisville R. Co.* 122 Ky. 59, 90 S. W. 1052; *Louisville R. Co. v. Wilder,* 143 Ky. 436, 136 S. W. 892; *Benjamin v. Metropolitan St. R. Co.* 245 Mo. 598, 151 S. W. 91; *Ottinger v. Detroit U. R'y,* 166 Mich. 106, 131 N. W. 528; *Lockwood v. Boston E. R. Co.* 200 Mass. 537, 86 N. E. 934, 22 L. R. A. N. S. 488.

MARSHALL, J. There is no complaint of the manner of submitting the case to the jury, either as to questions or instructions. The sole complaints were that there was no evidence of actionable negligence and was conclusive evidence of contributory negligence.

Whether there is room in the evidence in any particular case for reasonably different conclusions as to facts, is often not an easy question to solve. That is emphatically so from the point of view of the appellate court which has only the benefit of a printed history of the trial. Because of the difficulty being much less from the point of view of the trial judge, who has the benefit of personal observation of the witnesses while testifying and of thus placing himself in the very atmosphere, so to speak, which environed and characterized the controverted occurrence, in general, reasonable doubts arising from the record are resolved in favor of the initial determination.

So the rule has become firmly settled as part of the unwritten law that a trial court's decision as to whether evidence presents a jury question will not be disturbed on appeal unless it appears to be clearly wrong, after giving due heed to the special reasons why it may be right. Under such rule the case against a decision must, necessarily, be pretty conclu-

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sive to answer to the call for the certainty involved in the expression "clearly wrong."

Where the evidence in a case raises a jury question and the trial court has refused to exercise its discretion to grant a new trial, the jury solution is conclusive. If it happens to be wrong in fact, it is, nevertheless, right in law. Judicial remedies must end somewhere and wise public policy places the finality at this point, and it is useless to indulge in even the hope, that settled rules will be deviated from to suit a particular case.

The foregoing observations are made to show that appellant, in such a case as this, however much he may regard the judgment against him as unjust, is quite remediless, even though the court, as an original matter, might, in a more or less degree, share his view.

Here we are unable to see that clearness of error requisite to justify reversing the initial decision that reasonable conflicting inferences arise from the evidence. The special circumstances, obvious to the conductor, characterizing the situation when he signaled for the start, might well, in the judgment of the jury, have suggested that some such thing might, which in fact did, happen. The evidence must be viewed in the light of the duty to exercise the highest degree of care for the safety of passengers reasonably to be expected from human vigilance and foresight in view of the mode and character of the conveyance adopted, and consistent with the practical operation of the business. *Wanzer v. Chippewa Valley E. R. Co.* 108 Wis. 319, 84 N. W. 423.

The particular conduct which would satisfy the rule stated under some circumstances, manifestly might not under others. In the particular instance, because of the obvious difficulties the respondent had to contend with, the jury had reasonable ground to conclude that the conductor, instead of endeavoring by a quick start of the car to immediately make up for the short delay caused by her movements, should have been considerate of her somewhat helpless situation; that he

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should have taken her by the arm at the instant the car started, or motioned her forward and afforded her an instant of time to prepare for the shock which was imminent, or at least cautioned her, in view of the rather unusual start which the jury had fair ground to believe was intentionally made, to be on her guard against being disturbed by the sudden movement. If respondent was entirely unprepared to resist the shock, as counsel for appellant insist, it must have been quite obvious to the conductor, and, inasmuch as she had no time for deliberation and hardly time to mentally decide upon, or physically execute any movement for self-protection, and her mind was wholly occupied, as the conductor must, or ought to have observed, in thinking of her two charges, her package of merchandise, and of rescuing the money from her glove to pay her fare, there does not seem to be any fair ground for a decision that the jury were entirely unwarranted in acquitting her of the charge of contributory negligence.

There is no need of extending this opinion by further stating and analyzing the evidence in detail. The governing principle, as before suggested, is familiar. It rules this case in favor of respondent both on the question of whether defendant was actionably negligent and whether she was guilty of contributory negligence.

By the Court.—Judgment is affirmed.

STATE EX REL. ATTORNEY GENERAL vs. HAMMERLUND, City Clerk.

December 8, 1914—January 12, 1915.

Taxation: Reassessment: Collecting cost from taxing district: Constitutional law.

1. Sec. 1087—55, Stats., providing that the cost of a reassessment made by order of the tax commission shall be collected from the assessment district in which the reassessment was made, and returned to the state, is valid.

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2. The cost of such a reassessment is not a state expense incurred for state purposes, but a local expense for local purposes, incurred through state agency in order to correct a violation by local officers of the law relating to assessments; hence the provision that the state be reimbursed by the district does not violate the constitutional requirement that the rule of taxation shall be uniform. Const. art. VIII, sec. 1.

MANDAMUS action to compel the city clerk of the city of Janesville, Wisconsin, to extend upon the tax roll of such city the duly ascertained and certified indebtedness of said city for the expense of a reassessment under sec. 1087—45 to sec. 1087—57, Stats.

The law authorizes the tax commission, upon its appearing thereto that the assessment of property in any assessment district is not in substantial compliance with the statutes, and that the interest of the public will be promoted by a reassessment, to cause one to be made by its own appointees and to be reviewed and corrected by a board of review appointed by it, the expense to be audited as specially provided and paid, in form, as a demand against the state, but, in fact, on account of liability of the taxing district reassessed; the same to constitute indebtedness to the state, bearing interest at the rate of six per cent. per annum, and be certified to such district by way of the county clerk of the county within which it is situated, to be spread upon the next tax roll, collected in due course, and returned to the state to reimburse it for expenses incurred on behalf of such district.

The amount of the cost of the reassessment in question, audited, paid out of the state treasury, and certified to the city clerk of the city of Janesville in manner aforesaid, was $2,696.50 principal and $155.05 interest. Such clerk refused to comply with the command of the statute as to extending the same upon the tax roll. Pursuant to a petition exhibiting the facts, an alternative writ of *mandamus* was issued to coerce him in the matter. Issue was joined by a motion to quash the writ.

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The cause was submitted for the plaintiff on the brief of the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and for the defendant on that of *W. H. Dougherty* and *John Cunningham.*

MARSHALL, J. Whether, in general, the reassessment law is constitutional, is ruled in the affirmative by *State ex rel. Hessey v. Daniels,* 143 Wis. 649, 128 N. W. 565. I did not fully agree therewith and, as an original proposition, I could not now; but the court has spoken and is now firmly of the opinion that its conclusion is sound.

The former decision, though it did not expressly touch the particular detail of the law which gave rise to this litigation, by necessary inference, included it. A conclusion, in general, in favor of a law, as to its constitutionality, carries with it the means provided therein which are necessary to its vitality, such as expenses of administration.

The attack now made upon the reassessment law, is grounded upon the idea that it deals with state administration for state purposes, with state expense, and the imposition of such expense upon particular taxing districts. If the assumed premises be right in fact, the conclusion contended for would challenge serious attention. Are they right?

The legislature did not intend to feature the plan for reassessment as a state affair other than as to making the tax commission an instrumentality for the correction of improper local administration,—a remedy for a violation of law by local officers. That is the logic of *State ex rel. Hessey v. Daniels, supra,* which rules this case, as before indicated, in favor of respondent; but we will discuss briefly the particular detail of the law, showing that, neither expressly nor inferentially, does it deal with state expenses, as assumed by counsel.

The primary duty of making such an assessment as the law requires, rests with local authority. The duty of bearing the

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burden of executing the law and the duty, if the legislature so wills, of bearing that of remedying its default is incidental thereto. The idea of the statute in question is that payment of the expenses of correcting a local violation of the law as to assessment of property for taxation, is a proper penalty for the infraction and one which it would be unjust to cast upon the state in general. So payment for the services rendered in making a reassessment, out of the state treasury, and later reimbursing the state fund from the proceeds of a local tax, is a mere convenient method of, in practical effect, paying the expenses out of the local treasury.

True the statute speaks of paying the claims growing out of a reassessment proceeding as "other claims against the state are audited and paid," and of the amount so paid constituting "an indebtedness of the district in which such reassessment was made to the state of Wisconsin;" but that is merely *descriptio* of administrative details and not a characterization of the expense as an outlay for state purposes.

The real intent of the legislature is to be looked for. From that viewpoint it is easily seen, notwithstanding the term used in the law, that the expense of a reassessment is a local creation by state agency,—a local, not a state expense. In paying it,—though the form is the same as that of paying claims against the state,—the act, in practical effect, is merely that of taking over, by the state of the claims for doing the work for the locality, which equitably constitute a local burden, and by force of the statute, are made such legally. So it is considered that the assumed basis for the contention on behalf of defendant is unsound. The law in question does not contemplate imposing state expense, incurred for state purposes, on a particular subdivision of the state, in violation of the constitutional requirement that such expense shall be levied state-wide and on the rule of uniformity. The expense in question is local for local purposes.

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By the Court.—Ordered, that the motion to quash the alternative writ of *mandamus* be, and the same is overruled, and that a peremptory writ of *mandamus* issue to compel defendant to perform his duty as prayed, due return to such writ to be made with all convenient speed. No costs allowed.

STATE EX REL. BOARD OF REGENTS OF NORMAL SCHOOLS vs. EKERN, Commissioner of Insurance.

December 8, 1914—January 12, 1915.

State insurance of state property: Certificate by insurance commissioner essential.

Under secs. 1978*a* to 1978*c*, Stats. 1913, providing for state insurance of public property and establishing a state insurance fund, such property does not automatically become insured, but payments out of said fund are limited to losses of property which had been certified by the insurance commissioner to the state treasurer as insured, and to the amount of insurance thereon certified by said commissioner.

MANDAMUS to *Herman L. Ekern* as insurance commissioner of the state.

The relator applied for an original writ of *mandamus* to command the defendant, as insurance commissioner of this state, to file a statement with the secretary of state and state treasurer giving the total loss sustained through the destruction by fire of the normal school buildings in the city of Superior, to enable the secretary of state to issue his warrant for the amount of such loss to the state treasurer for the transfer of this amount from the "state insurance fund" to the funds under the control of the relator, as normal school regents, to enable them to restore the buildings and other property so destroyed by fire.

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The petition shows that the real and personal property constituting the state normal school at Superior consisted of a large main building and two wings connected therewith, and the contents thereof. The main part of the building was constructed in 1896. One wing was constructed in 1908, and the other was completed in 1913 and accepted on February 5, 1913. On March 27, 1914, the main building and additions thereto with contents were completely destroyed by fire. The total loss occasioned by such fire is alleged to amount to $201,300. The petition also alleged that the defendant neglected and refused to ascertain and fix the total amount of such loss by fire and to file a statement thereof with the secretary of state and the state treasurer and certify the total loss to the secretary of state to authorize him to issue his warrant therefor to the state treasurer to authorize him to transfer such amount from the "state insurance fund" and credit the same to the fund of the normal school regents, who had charge and control of these properties and are authorized to rebuild or restore the property so destroyed. It is further alleged that the defendant, after February 5, 1913, the date of the completion and acceptance by the relator of the wing last constructed as an addition of the school building, omitted to certify, as required of him, the amount of insurance upon such property to be carried by the state and omitted to order the state treasurer to credit the "state insurance fund" with sixty per cent. of the premium for such insurance, fixed by him as insurance commissioner. Petitioner alleges that the defendant, through experts appointed by him, has been fully informed that the loss occasioned by fire to the school building amounts to $148,300 and the loss to the contents of the building amounted to $53,000, but that notwithstanding these facts he did, on April 23, 1914, certify to the secretary of state that he had fixed the amount of such loss which is to be paid out of the "state insurance fund" at the sum of $94,500, and directed that such amount be transferred from

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the insurance fund to the fund of the board of regents of the state normal schools.

The defendant in his return alleges that he, on July 1, 1912, had ascertained the value of the buildings and contents of the state normal school at Superior to be as follows: building $90,000, and the contents thereof $15,000, and that he certified the amount of insurance thereon from July 1, 1912, to June 30, 1913, at $81,000 on the building and $13,500 on the contents; that the premium charge thereon amounted to $260.55, and that such certification was properly filed and the respective accounts properly debited and credited by the state treasurer; that he withheld certification of insurance of the normal school properties after July 1, 1913, for information from the board of normal school regents, and that he received a corrected schedule of the normal school properties on or about January 17, 1914, and that according to such schedule no change of conditions or value of the property of the Superior normal school was reported to him, and that he, on February 15, 1914, pursuant to such report, duly certified the insurance of this property from July 1, 1913, to June 30, 1914, at the same value at which it had been fixed the preceding year, and for the same amount of insurance and the same amount of premium, and that he ordered the premium transferred to the "state insurance fund;" that he received no report or information of any change in the construction of the building or other information concerning any changes in value of this property before he certified this insurance, which expired June 30, 1914. The defendant alleges that he caused an investigation to be made of the loss sustained by the destruction of the building and contents and found that it exceeded the amount of the existing insurance at the time of the loss and therefore fixed the loss at the full amount of the insurance and allowed damages at this sum, $94,500, and that he has duly certified the same to the secretary of state and the state treasurer.

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The petitioner demurred to the return upon the ground that it did not state facts sufficient to constitute a defense.

A. C. Umbreit, special counsel for the state and attorney for the relator.

For the defendant there was a brief by the *Attorney General* and *Walter Drew,* deputy attorney general, and oral argument by *Mr. Drew.*

SIEBECKER, J. The law providing for insurance by the state of state property and creating a "state insurance fund" for the payment of losses by fire and tornado was enacted as ch. 68, Laws of 1903, and is entitled "An act to provide for state insurance on public buildings, and making an appropriation therefor." The provisions thereof with the amendments thereto appear as secs. 1978*a*, 1978*b*, and 1978*c*, Stats. 1913. This law annulled the power of all officers and agents of the state to contract for insurance of any public buildings or property of the state against loss by fire or tornado and inhibited paying out any public moneys therefor or incurring any indebtedness on account thereof against the state, except as provided in the act.

The relator asserts that the law contemplates that all state property is thereby insured for an amount equal to ninety per cent. of the cash value, regardless of the insurance commissioner's omission to determine the insurable value of each item of state property annually on July 1st and to certify the amount of insurance thereon to be carried by the state to the state treasurer and order him to credit the "state insurance fund" with the amount of the premium fixed by the commissioner in the manner prescribed in the law and debit such amount to the proper account of the public authority having the property in charge. This claim of the relator involves the inquiry of the legislative intent in providing this scheme for insuring state property in the way prescribed in these statutes. The statutes positively prohibit insurance of state

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properties by private insurance agencies. They provide a scheme for carrying insurance on property owned by the state and prescribe the method of fixing the cash value for the purpose of such insurance and for making an annual charge against the specific fund of the public authorities having the building and property under their control and management. The plan adopted of insuring such property is, in its ways and methods, like those employed by insurance agencies and adopts the average rate of such agencies as a proper rate. Each department of state having the property in charge is to pay into the fund the cost of insurance. The language of the act declaring that: "Upon July 1st, annually, the commissioner of insurance of the state shall provide for the insurance by the state of all state property for an amount equal to ninety per cent. of the cash value of such property," evinces an intent that the state is to insure the property of the state and commands the commissioner to execute the undertaking and thereby effect the insurance of state property. The provisions of the act also limit the amount for which the property is to be insured to ninety per cent. of its cash value and provide how the insurable value shall be determined. The provisions directing that, if the amount of insurance in force on such property is less than ninety per cent. of its value, the commissioner shall provide additional insurance up to such value in the manner specified in the statutes, and that "He shall certify to the state treasurer the amount of insurance upon such property to be carried by the state, . . ." are certain in their meaning and plainly express a legislative purpose of effecting insurance of state property at the rate to be ascertained by the commissioner as directed and of creating a "state insurance fund" for payment of the losses of such property by fire or tornado. The various provisions of the statutes, when considered as a whole, are unambiguous in their meaning and must be accepted and carried into effect as expressive of the legislative purpose. The practical effect of all

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the parts of the act, when applied to the external facts of the subject involved, is the creation of a system of state insurance of state property and the establishment of a "state insurance fund" out of which fire and tornado losses are to be paid for reconstruction of buildings and restoration of other property lost. It is also manifest that participation in the benefit of this insurance fund by any department of the state in charge, control, and management of the lost properties is conditional upon certification by the insurance commissioner to the state treasurer of the insurance effected by him in the manner specified in the statutes. The provisions of sec. 1978*c* providing for adjustment of the loss of property certified as insured and payment of the loss out of the "state insurance fund," when read in connection with the other parts of the statute, show that it was intended that payment out of this fund should be limited to losses of property which had been certified as insured to the state treasurer by the insurance commissioner. The claim of the relator that the whole property of the Superior normal school was automatically insured under the law, though not certified to the state treasurer by the insurance commissioner, is clearly negatived and wholly out of harmony with the evident purpose and intent of the legislature. The action of the legislature in adding to the original act a grant of authority to counties, towns, cities, villages, and school districts to insure their properties against loss with the state and secure payment for losses out of the "state insurance fund" upon property certified by the commissioner, and payment of the rate of insurance fixed by him in the manner state property is insured, shows clearly that the legislature interpreted the law as providing for insurance of property to the amount specified by the statute in analogy to the usual and well known practices under which private insurance is effected.

The commissioner of insurance was correct in determining that the amount due the relator was limited to the amount

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which he had certified to the state treasurer as insurance upon the Superior normal school buildings and their contents.

The facts before the court upon the petition and return show that the relator is not entitled to relief. The demurrer to the return must be overruled and judgment ordered quashing the writ, without costs.

By the Court.—It is so ordered.

BARNES, J., dissents.

GIMBEL BROTHERS, Appellant, vs. MCCONNELL, Respondent.

December 9, 1914—January 12, 1915.

Contract for benefit of third person: Escrow: Failure to comply with conditions: Release.

A contract providing that the owner of certain property should convey it to defendant free of all liens or claims except two mortgages, and that as part of the consideration defendant should assume and pay plaintiff's claim against said owner, was, together with the proper deeds, placed in escrow, not to be delivered until the owner was able to comply with the conditions of the contract. Being unable to comply therewith, the owner afterwards in terms released defendant from paying plaintiff's claim. *Held*, that as the contract never became operative defendant never became liable to pay plaintiff's claim. *Tweeddale v. Tweeddale*, 116 Wis. 517, and *Wetutzke v. Wetutzke*, 158 Wis. 305, distinguished.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to recover $1,760.63 claimed to be due from defendant under an agreement alleged to have been entered into between him and one Bridge, who was indebted to plaintiff in that amount. Bridge owned a hotel at Portage which on July 17, 1911, he agreed to deed to the defendant free of all

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liens or claims except two mortgages amounting to $10,000. As a part of the consideration defendant agreed to pay plaintiff's claim against Bridge to the amount stated. Defendant denied that Bridge ever performed his part of the contract; alleged that he was unable to do so and on that account the agreement between them was rescinded. He further alleged that after the rescission of his contract with Bridge plaintiff settled his account with him by accepting notes from him in full payment of the account; that Bridge has been adjudged a bankrupt, and that plaintiff has filed the notes referred to in the bankruptcy proceeding and is there seeking to collect them. The written contract for the sale of the hotel, signed by the defendant and Bridge, contained this provision: "This agreement is to be fully consummated and the papers exchanged on or before the 20th day of August, A. D. 1911; said *McConnell,* however, is to have possession of the Portage hotel property from this date." The contract and papers were placed in escrow with one Morgan and were not to be delivered till Bridge was able to comply with the terms of the agreement. He never complied therewith, but on the contrary liens amounting to about $6,000, in addition to the two mortgages, were filed against the hotel after the agreement was executed and while the papers were in escrow. They were held by Morgan at the time defendant discovered the additional liens on the property, and there is nothing to show they had been delivered when defendant and Bridge made the new arrangement whereby defendant was released from paying plaintiff's claim, or that they have since been delivered.

The trial court found that on July 17, 1911, the defendant entered into a contract with Bridge which provided that the latter should transfer to the defendant certain real estate free and clear of all liens or claims except two mortgages, and that the defendant should assume and pay Bridge's account with plaintiff; that Bridge never carried out his part of the contract by transferring the real estate bargained for free of

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all liens and claims except two mortgages; that subsequent to July 17, 1911, it was mutually agreed between Bridge and the defendant that Bridge should pay his claim to plaintiff and the defendant should be relieved from the payment thereof, and that defendant took and still retains possession of the hotel. It further found that on or about September 20, 1912, the plaintiff and Bridge agreed that the latter should give his notes to the former for the amount of the account in suit, which was done; that the notes were accepted by the plaintiff as payment of the account and it then released defendant from further liability thereon. Judgment was entered dismissing the complaint and the plaintiff appealed.

For the appellant there was a brief by *Freeman & Geilfuss* and *Byron H. Stebbins,* and oral argument by *Mr. Stebbins.* They contended, *inter alia,* that the right of a third person to enforce a contract made for his benefit does not depend upon the performance by the immediate parties to the contract of other promises made by them. It is the making of the promise, not its performance, that is the consideration for the promise to pay the third person. The rights of the third person are not subject to the condition that the promisee shall fully perform, any more than to the condition that the contract continue in force—be not abrogated by the immediate parties thereto. They cited, among other cases, *Tweeddale v. Tweeddale,* 116 Wis. 517, 526, 93 N. W. 440; *Wetutzke v. Wetutzke,* 158 Wis. 305, 148 N. W. 1088, 1090; *Johnston v. Charles Abresch Co.* 123 Wis. 130, 137, 101 N. W. 395; *Gilbert P. Co. v. Whiting P. Co.* 123 Wis. 472, 102 N. W. 20; *Fanning v. Murphy,* 126 Wis. 538, 544, 105 N. W. 1056; *Whiting v. Hoglund,* 127 Wis. 135, 137, 106 N. W. 391; *Peterson v. C. & N. W. R. Co.* 119 Wis. 197, 203, 204, 96 N. W. 532; *R. Connor Co. v. Ætna I. Co.* 136 Wis. 13, 20, 21, 115 N. W. 811; *Warren Webster & Co. v. Beaumont H. Co.* 151 Wis. 1, 10, 138 N. W. 102; *Zwietusch v. Becker,* 153 Wis. 213, 216, 140 N. W. 1056; *Davis v. Calloway,* 30 Ind.

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112, 95 Am. Dec. 670; *Helms v. Kearns,* 40 Ind. 124; 25 L. R. A. 258, note; *Getchell & M. L. M. Co. v. Peterson,* 124 Iowa, 599, 100 N. W. 550; *Doll v. Crume,* 41 Neb. 655, 59 N. W. 806; *School Dist. ex rel. Koken Iron Works v. Livers,* 147 Mo. 580, 49 S. W. 507; *Kansas City ex rel. Diamond B. & T. Co. v. Schroeder,* 196 Mo. 281, 93 S. W. 405, 409; *Kauffman v. Cooper,* 46 Neb. 644, 65 N. W. 796; *People for use of Reynolds v. Banhagel,* 151 Mich. 40, 114 N. W. 669, 670.

For the respondent there was a brief by *Edward J. Reynolds* and *Henry T. Sheldon,* and oral argument by *Mr. Reynolds.*

VINJE, J. Plaintiff's counsel says the finding of the trial court that "Defendant should assume and pay the account of said Bridge with the plaintiff" is not excepted to and is therefore a verity in the case. The language of the trial court is that the defendant entered into a contract with Bridge which provided that he should assume and pay the claim. Ordinarily this would be equivalent to a finding that he agreed to assume and pay it. But the language of the trial court, taken in connection with the undisputed facts, shows that he is merely reciting the provisions of the agreement placed in escrow, which was nothing more nor less than a reduction to writing of the terms of an understanding which both parties agreed should become binding in the event that Bridge should be able to transfer the property free from all liens except the two mortgages. It was only an agreement *in fieri;* an understanding reduced to writing but not to become operative until certain prescribed conditions were complied with. Such conditions in this writing were never complied with, so it never became an operative agreement. There never was an unconditional contract entered into between defendant and Bridge that the former should pay the latter's account with plaintiff. On the other hand it was discovered that additional liens were

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placed on the property which the defendant had to assist in paying. Bridge in terms released him from paying plaintiff's claim. Such agreement was not a release of any liability of defendant to plaintiff, for there had been none; nor was it in fact a new agreement, since the contemplated one of July 17, 1911, never ripened into an agreement.

The facts of the case, therefore, do not bring defendant within the rule of *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440, and *Wetutzke v. Wetutzke,* 158 Wis. 305, 148 N. W. 1088, where it was held that a valid agreement entered into between two persons for the benefit of a third cannot be rescinded or altered without the consent of such third person.

Plaintiff, upon being informed of the substance of the contents of the writing entered into July 17, 1911, sought for some time to collect its claim from both Bridge and the defendant. The latter in substance always told plaintiff that he would pay the claim if Bridge fulfilled his part of the contemplated agreement. Upon learning from Bridge that there was small prospect of his being able to convey subject only to the two mortgages, plaintiff took his notes for the amount of its claim and thereafter tried to collect them from him as they fell due, and filed them in the bankruptcy proceedings. The court found that they were taken in payment of the claim and that defendant was released. Were it necessary to pass upon this aspect of the case we should hold that the evidence sustains the findings. But as already indicated, we rest the decision upon the fact that no valid unconditional promise on the part of the defendant to pay plaintiff's claim has been shown.

By the Court.—Judgment affirmed.

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STOUGHTON STATE BANK, Respondent, vs. CITY OF STOUGHTON, imp., Appellant.

December 9, 1914—January 12, 1915.

Municipal corporations: Taking land for streets, etc.: Deduction of benefits from damages: Subsequent assessment for benefits.

Where a part of certain land is taken by a city for an alley, and in the condemnation proceedings the special benefits resulting to the landowner are, under sec. 899, Stats., deducted from the amount awarded as damages, the city cannot thereafter, under sec. 903, levy a special assessment upon the residue of the land on account of the same special benefits.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This action is brought by the plaintiff against the defendant and the treasurer of Dane county to restrain the collection of certain special assessments levied on plaintiff's property by the common council of the city of *Stoughton.*

The plaintiff was the owner of certain property in the city of *Stoughton* over which the defendant laid out and established a public alley. The property was taken by condemnation proceedings in which the jury assessed the damages by appraising the property of the plaintiff so taken for an alley and the damages which the plaintiff otherwise sustained by reason of the taking of its property for such alley, and deducted from such damages all special benefits plaintiff received by reason of the laying out and opening of such alley.

Soon after such condemnation proceedings assessing plaintiff's damages and deducting therefrom the special benefits plaintiff derived from the laying out of the alley, the common council of the city of *Stoughton* determined that the plaintiff's property was specially benefited by the establishment of this alley and levied a special assessment of the amount of such benefits against this property, to be applied in payment of the expense of establishing the alley. This

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assessment so levied upon plaintiff's property was placed upon the city tax roll and payment demanded, which was refused. Upon default in payment of such special tax this assessment and levy were returned by the city treasurer to the county treasurer as delinquent and the county treasurer gave public notice exposing the plaintiff's property for sale at public auction for the nonpayment of delinquent taxes for 1911.

The circuit court found that this assessment against plaintiff's property was illegal and void and that it should be set aside and annulled, and held that the plaintiff was entitled to judgment perpetually enjoining the defendants from collecting or attempting to collect this assessment and that plaintiff recover its costs and disbursements from the defendant. From such judgment this appeal is taken.

For the appellant there were briefs by *Clancey & Loverud,* and oral argument by *E. K. Loverud.*

For the respondent the cause was submitted on the brief of *Rufus B. Smith.*

SIEBECKER, J. The plaintiff commenced the action to restrain the collection of a special assessment which the defendant city levied and assessed upon the plaintiff's property for the purpose of paying the expenses, including the damages and costs, incurred by the city for the taking of private property and the laying out and opening of an alley which passes over a part of the plaintiff's property upon which this special assessment was levied. The city of *Stoughton* under appropriate proceedings condemned and appraised lands of the plaintiff to be taken for the purpose of laying out and establishing a public alley. In such proceeding it was also determined what damages the plaintiff otherwise sustained by reason of such taking of a part of plaintiff's property for this public purpose. It appears that these questions were submitted to a jury duly impaneled in the county court of Dane county and that such jury rendered their verdict fixing sep-

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arately the value of the plaintiff's land taken for the purpose of such alley and the damages the plaintiff otherwise sustained by reason of the taking of such land and the laying out of such alley over plaintiff's property. It also appears that in determining upon the last mentioned element of plaintiff's damage the jury were directed that in determining upon this amount in their verdict they should deduct from the amount of the damage the plaintiff actually sustained by the taking of its property for this public purpose the special benefits the plaintiff derived from such public improvement.

It is contended by the plaintiff that the city of *Stoughton* illegally imposed the tax here in question and wrongfully levied the same on its property as a special benefit resulting from the establishing, laying out, and opening of the proposed alley. This claim is made upon the ground that the plaintiff has paid the same by having the full amount of such special benefit deducted from the damages awarded to it in the condemnation proceeding instituted to take a part of its property for such alley. An examination of the facts and circumstances upon which the condemnation proceeding and this special assessment proceeding are based discloses that the special benefits which were ascertained and deducted in the condemnation proceeding from the damage plaintiff sustained from the taking of its property for the purpose of this alley, aside from the value of the land taken, were the same elements which constitute the special benefits for which the city assessed and levied the tax in question for the payment of expenses in laying out and opening this alley. Under the circumstances shown the special benefits considered and charged to plaintiff in the proceeding for condemnation under sec. 899, Stats., and the special benefits involved in the proceeding under sec. 903, Stats., and which were assessed and levied as a tax to pay the expenses of this public improvement, embrace and cover the same thing, in so far as the plaintiff's rights and burdens, as owner of this property, are involved. The manifest result of the city's action, by which it imposed the

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tax upon plaintiff's property under sec. 903, Stats., is to compel the plaintiff to pay the benefits resulting to its property from the opening of this alley a second time. We see no escape from this conclusion. To permit the enforcement of this assessment and levy would result in an invasion of the plaintiff's constitutional right of receiving a just compensation for its property taken for a public use, in that the amount of such tax diminishes *pro tanto* the compensation it was awarded for the property taken from it for such alley.

The circuit court properly awarded judgment declaring the assessment and levy of this tax on the plaintiff's property to be illegal and properly perpetually restrained the city of *Stoughton,* its officers, agents, and servants, and the defendant Robert W. Davis as county treasurer of Dane county, his agents and his successors in office, from collecting or enforcing the payment of such tax and from selling the plaintiff's lands for the nonpayment thereof.

By the Court.—The judgment appealed from is affirmed.

OLDENBERG, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

December 9, 1914—January 12, 1915.

Workmen's compensation: Industrial commission: Orders: Evidence.

1. **An order of the industrial commission will not be *held* to have been "in excess of its powers," on the ground that there was no evidence to sustain it, unless there was an entire lack of relevant evidence tending to support the ultimate conclusion of fact upon which the order is based.**
2. **Findings by the industrial commission in this case that an employee had been fully compensated by his employer for all loss of wage resulting from certain injuries, and that at the time the payment of compensation ceased and he signed a release he had recovered from the effects of the injuries so that he was able to return to work without further loss of wages because of said injuries, are *held* to have support in the evidence.**

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APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Henry Mahoney* and *Glicksman, Gold & Corrigan,* and oral argument by *Mr. Mahoney.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

TIMLIN, J. The appellant, while engaged in the performance of his duties as employee of respondent *Milwaukee Electric Railway & Light Company,* was injured on June 20, 1912. Both the appellant and his said employer were then subject to the provisions of ch. 50, Laws of 1911. The employer furnished the medical attendance required at the time of the accident and paid the appellant sixty-five per cent. of his average weekly wages from the time of the accident until September 9, 1912. On the day last mentioned the appellant executed a release and returned to work for his said employer as night watchman for wages equal to those he was earning at the time of his injury, and continued at such work until some time in November, 1912, when he was discharged for cause. After the lapse of a few days he was reinstated as night watchman and worked at this until about January 1, 1913, when work of that kind was discontinued. Appellant attempted other work, shoveling snow, which he was unable to perform, and he remained idle until the latter part of March, 1913. At the time last mentioned the work requiring a night watchman was resumed and appellant went back to work and continued until July 8, 1913, when he was again discharged for incompetence. On August 22, 1913, he made application to the *Industrial Commission* for the benefit to be obtained under the Employers' Liability Act, and after a hearing his application was dismissed by that board. The

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reason for dismissing the application is thus given in the order of the board:

"That the respondent has fully compensated the applicant for all loss of wage resulting from the injuries sustained on June 20, 1912, and that on September 8, 1912, the applicant had recovered from the effects of the injuries so that he was able to return to work without further loss of wages because of injuries sustained on June 20th."

The ruling of the circuit court sustained that of the *Industrial Commission,* and the appellant seeks a reversal on the ground that the order of the *Commission,* being made without any evidence to sustain it, was therefore an order made without jurisdiction. Sec. 2394—19, Stats. (Laws of 1913, ch. 599). Manifestly a very clear case must be made to call for a ruling such as that sought by appellant from this court. All evidence which tends to render probable or improbable the existence of the facts which are the subject of inquiry is relevant, and conversely all relevant facts have this tendency. In order to support an argument to the effect that an ultimate conclusion of fact has no evidence to support it there must be shown an absence of all evidence or an absence of any such relevant evidence. There is much evidence to the effect that the appellant after September 8, 1912, and during the early part of 1913 was nervous and hysterical in a high degree, and also evidence that prior to the injury on June 20th he was in a state of health. This would have furnished a basis for a finding by the board that he was entitled to compensation. But it is quite a different thing to say that the board was compelled to so find. The release executed by the appellant was an item of countervailing evidence in the nature of an admission. The fact of his going to work and continuing to work as night watchman as above stated was another item; plaintiff's admission that he got along all right at such work another; while the testimony of Drs. Lemon and Mc-

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Govern, as we read such testimony, furnishes still another item. We cannot say that the decision of the *Commission* is without any evidence to support it, and therefore the judgment of the circuit court is affirmed.

By the Court.—Judgment affirmed.

STUDEBAKER CORPORATION OF AMERICA, Appellant, vs. GOLLMAR and another, Respondents.

December 9, 1914—January 12, 1915.

Sales: Automobiles: Warranty: Replacement of defective part by manufacturers: Dealer's contract: Custom: Charge for new part to be paid by return of old: Failure to return: Liquidated damages: Pleading: Counterclaim.

1. In accordance with a custom of dealing between an automobile manufacturer and a dealer, understood and consented to by the latter, the manufacturer, upon shipping to the dealer a new motor as an exchange of parts pursuant to a warranty, charged up to the dealer the agent's price of the new motor pending the return of the old one, and sent a bill accordingly. A corresponding credit was to be given for the old motor when returned as agreed. *Held*, that there was no purchase and sale of the new motor, but the price so charged for it must be regarded as stipulated damages in case of a failure to return the old one.
2. A counterclaim by the dealer in such case, alleging that the old motor was defective through fault of the manufacturer and that at its special instance and request the dealer had rendered services upon such machine, stating the reasonable value of such services, is a good counterclaim.

APPEAL from a judgment of the circuit court for Sauk county: JAMES O'NEILL, Judge. *Reversed.*

Action to recover the purchase price of a motor. September 1, 1911, the plaintiff and defendants entered into a contract known as a "Dealers Agreement," whereby the latter

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were given the exclusive right to sell in a specified territory motor cars manufactured by plaintiff. The contract contained these provisions:

"The dealer agrees that in consideration of the manufacturers furnishing free of charge under the terms of such guaranty, such new parts as may be required to make replacement on the cars of customers within his territory, that he will pay the transportation charges on all such parts so furnished from the place of the manufacturer or branch house to the place of delivery to the customer entitled to receive the same, and also at the option of the manufacturer return to it such so-called broken or defective parts replaced, on which the manufacturer agrees to pay the return transportation charges. Such parts replaced by the dealer and claimed to be defective or broken shall be subject to the inspection and approval of the manufacturer." . . .

"If any part or parts of this car break or prove defective within one year from any cause whatsoever, and the customer shall forthwith communicate the facts to the *Studebaker Corporation,* or one of its authorized dealers, giving the number of the car and the name of the dealer from whom the car was bought and the date of purchase, and if it shall appear that such breakage was not in fact due to misuse, negligence or accident, the *Studebaker Corporation* will furnish such new part either at a branch house or at its factory in Detroit, Michigan, free of charge to the owner."

Defendants sold a car to one Ott and it was claimed its motor was defective. Plaintiff shipped a new one, and according to its usual custom sent a bill of $410 to defendants. Under the word "terms" therein appeared the words "Charge to same pending return." This was explained by one of the defendants as meaning that the new motor was charged to them at $410, the agent's price, pending the return of the old motor from the Ott car. When that was returned and approved by plaintiff it would give them a credit of $410. The new motor was installed by defendants in Ott's car, but the

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motor which was in it when purchased was not returned. The trial court was of the opinion that the plaintiff's action was one for damages for not returning the old motor. Plaintiff refused to introduce any evidence as to the value of the old motor and stood upon its right to recover the purchase price of the new motor, $410. The defendants had interposed two counterclaims, but in order to enable the court to rule upon plaintiff's contentions these were, upon a motion for a nonsuit, withdrawn. The court granted the motion for a nonsuit, and from a judgment entered accordingly the plaintiff appealed.

For the appellant there was a brief by *V. H. Cady* and *Grotophorst, Evans & Thomas,* and oral argument by *Mr. Evan A. Evans* and *Mr. Cady.*

For the respondents there was a brief by *Bentley, Kelley & Hill,* and oral argument by *F. R. Bentley.*

VINJE, J. The complaint alleges the sale of a motor and that the account therefor became due and payable within a reasonable time either by the return of the defective motor or by a payment in cash. The trial court did not regard the transaction as a sale to the defendants of a new motor, but as an exchange of parts of a motor car between the purchaser of the car and plaintiff pursuant to the terms of its contract of guaranty carried out through the agency of the defendants; that the defendants breached their contract by failing to return the old motor, and plaintiff's damages resulting therefrom were the value of the old motor and not the purchase price of a new one. Were this the only transaction of its kind between plaintiff and defendants and had no bill been sent when the new motor was shipped, there would be good ground for limiting the damages to the value of the old motor. But the evidence shows that the custom of dealing in such matters was to charge up to the defendants the agent's price of the new part pending the return of the old, for which, when returned and accepted, a corresponding credit was

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given. This custom of dealing was thoroughly understood and consented to by the defendants. The effect of it was equivalent to the plaintiff saying to the defendants and the latter agreeing thereto: You return the old defective part to us or pay us the price charged you for the new. The price charged was the amount of damages agreed upon in case no return of the old part was made. Such a construction works no hardship upon dealers who return defective parts, and at the same time it adequately protects the manufacturer. He would in most cases be unable to prove the value of the defective part because of its having been out of his possession since new. And if the only penalty attached to a failure to return an old part was a payment of what a jury might assess its value, there would often be strong inducements to make purchases of old parts upon such terms. Under the custom of dealing between the parties the amount charged for the new part must be regarded as stipulated damages in case of a failure to return. The trial court was correct in construing the transaction not as a purchase and sale of a new motor, but as an exchange of parts under their contract. The error occurred in applying the wrong measure of damages. Under the evidence plaintiff was entitled to recover $410, the agent's price of the new motor.

Upon the oral argument in this court counsel for plaintiff stated that if it was held plaintiff was entitled to recover $410 it would concede the amount of defendants' first counterclaim in the sum of $182.15 and take judgment for the balance, provided a good counterclaim was stated. Defendants in said counterclaim allege in substance that the Ott motor was defective through the fault of the plaintiff and that at its special instance and request they rendered services upon such machine of the reasonable value of $182.15. This states a good counterclaim. The allegation that the services were rendered at the special instance and request of the plaintiff leaves no room for its claim that under their contract the defendants were required to perform such services without

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cost to it. We must assume that defendants' proof will be as broad as their pleading in passing upon its sufficiency. The defendants, however, have interposed other counterclaims upon which they may desire to stand, so we cannot award judgment for the difference. But the defendants may have the option of submitting to a judgment against them for $227.85, the difference between $410 and $182.15, or a new trial.

By the Court.—Judgment reversed, and cause remanded for further proceedings in accordance with the opinion.

BOURNE and another, Appellants, vs. WIELE and wife, Respondents.

December 9, 1914—January 12, 1915.

Adverse possession: Claim of title: "Judgment of a competent court:" Certificate of heirship: Unknown heirs: Written instrument: Quitclaim deed: Evidence.

1. Whether a certificate of heirship issued *ex parte* by the county judge at chambers, as authorized by sec. 2276*a*, Stats., is a "judgment of a competent court" within the meaning of sec. 4211, is doubted.
2. Where such a certificate was to the effect that land of a decedent belonged in equal parts to nine persons (naming them) as his heirs, subject to the dower right of the widow, a quitclaim deed given by said nine persons to the widow and which, construed with the certificate, purported to convey the whole title, was a written instrument upon which adverse possession might be based under sec. 4211, Stats.
3. It appearing that there were other heirs of the decedent who were not named in said certificate, but that neither the widow nor her subsequent grantees of the land had ever known of their existence and that, prior to the commencement of the action by said other heirs, the widow and her said grantees (defendants in the action) had occupied and possessed the land for more than ten years, claiming title under said quitclaim deed adversely to any other right, the defendants were properly held to have acquired title by adverse possession.

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APPEAL from a judgment of the circuit court for Sauk county: JAMES O'NEILL, Judge. *Affirmed.*

Action of partition. Plaintiffs claim to own an undivided one-tenth interest in thirty acres of farm land as the heirs at law of one Agnes Yost, who was one of the ten surviving children of Richard Wiele. The trial court found that the defendants had obtained title to the land by adverse possession. The facts appearing either by stipulation or by practically undisputed evidence were as follows: Richard Wiele was the common source of title, and owned the land up to the time of his death intestate in 1883. He had been married twice. By his first wife he had three children, Balthazar, Emma, and Agnes, the latter being the mother of the plaintiffs. By his second wife, Mary (who survived him), he had seven children, Christiana, Mary, Herman, Richard, Susan, *Christian* (the defendant), and Ida. Agnes Yost, the mother of the plaintiffs, died before her father. After Richard's death his widow, Mary, with her children, remained in possession of the premises, which were marshy pasture lands inclosed with a fence. May 31, 1898, the said Mary and the defendant *Christian* made a petition to the county judge, representing that Richard Wiele died seised of the premises in dispute and leaving as his sole heirs Mary Wiele, his widow, and the nine children who survived Richard, but said nothing about Agnes or her children. On this petition without notice the county judge made a certificate to the effect that the land belonged to the said nine children in equal shares, subject, however, to the dower right of the widow. This certificate was recorded on the same day in the proper register of deeds' office, and also on the same day all of said nine children quitclaimed their right, title, and interest in the premises to their mother, Mary, which deed was recorded some months later. Mary paid the two stepchildren $50 each for their interests, but the other children executed the deed without consideration. After the making and recording of said

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certificate and deeds the widow remained in possession of the premises claiming title until June, 1904, when she conveyed the same by warranty deed to her son and his wife, the defendants in this action, who remained in possession claiming title adversely to any other right up to the time of the commencement of this action in September, 1913. The plaintiffs reside in Kansas, but for how long a time does not appear. It does appear, however, that the defendant *Elizabeth,* who was married to the defendant *Christian* in 1890, never had heard of the plaintiffs or of any children of Agnes Yost until the commencement of this action. The court held that the defendants had acquired title to the lands by adverse possession and dismissed the complaint, from which judgment the plaintiffs appeal.

For the appellants there was a brief by *Bentley, Kelley & Hill,* and oral argument by *F. R. Bentley.*

For the respondents there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *Evan A. Evans.*

WINSLOW, C. J. The question is whether the facts justify a finding of adverse possession.

Sec. 4211, Stats., provides in substance that ten years' occupancy of premises under claim of title, exclusive of any other right, such claim being founded upon some written instrument as being a conveyance thereof, or upon the *judgment of some competent court,* shall be deemed an adverse holding.

Sec. 2276*a,* S. & B. Ann. Stats. 1889, as amended by ch. 28, Laws of 1893 (now sec. 2276*a,* Stats. 1913), provides that on application of the heirs of a deceased person the county judge may issue a certificate setting forth the names of the heirs of the deceased person and their respective interests in the premises of which the deceased died seised, which certificate when recorded in the office of the register of deeds shall be *prima facie* evidence of the facts therein recited.

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We should have great hesitation in holding that the certificate authorized by the last named section, granted *ex parte,* and by the judge at chambers instead of by the court, is a "judgment of a competent court" within the meaning of sec. 4211 above cited. It is not necessary to so hold in order to sustain the judgment.

A quitclaim deed in this state is equivalent, at least for the purpose of conveying title, to a deed of bargain and sale. *Home Inv. Co. v. Emerson,* 153 Wis. 1, 140 N. W. 283; sec. 2207, Stats. After the execution of the quitclaim deed by the nine children in 1898 the widow held possession of the premises, claiming title under that deed as being a conveyance of the premises. The deed, construed with the certificate of heirship, purported to convey the whole title, and must be held to be a written instrument such as is named in sec. 4211 as sufficient on which to base adverse possession. If it appeared that either the widow or the defendants had ever recognized or acknowledged that the plaintiffs had title as cotenants to any part of the premises, it would probably be necessary that actual knowledge of the changed and hostile character of the defendants' possession be brought home to the plaintiffs before such possession could be held adverse. *Sydnor v. Palmer,* 29 Wis. 226. No such acknowledgment appears, however. On the contrary, all the evidence on the subject indicates that neither the widow nor the present defendants ever knew of the existence of the plaintiffs, and hence never acknowledged that the plaintiffs had any interest in the premises.

Under the circumstances, we deem the evidence sufficient to prove ten years' adverse possession under a claim of title founded upon a written instrument as being a conveyance of the premises, thus fulfilling the calls of sec. 4211.

By the Court.—Judgment affirmed.

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FIRST SAVINGS & TRUST COMPANY, Respondent, vs. CAZENOVIA & SAUK CITY RAILROAD COMPANY, Respondent: HANZLIK, Appellant.

December 10, 1914—January 12, 1915.

Contract for services: Performance: Right to compensation: Evidence: Interest upon interest coupons: Mortgage securing bonds: Foreclosure: Priority as to interest payments.

1. A finding by the circuit court that a petitioner, who claimed to be entitled to payment for services performed by him under contract as general manager of a railroad company prior to the appointment of a receiver, had breached his contract and had not performed the services required of him, is *held* to be sustained by the evidence.
2. Under sec. 1689, Stats., where neither the interest coupons nor any other writing provided that the interest due on bonds should bear interest from maturity, no interest on the amounts of said coupons is recoverable.
3. A trust deed of railroad property provided that it was given to secure the "*pro rata* payment" of certain "bonds and the interest thereon," and that it should secure "equally dollar for dollar all of said bonds of all denominations without preference or priority of one bond over another." It also provided that if the trustee should take possession of and operate the railroad he might, after paying current expenses out of the revenue obtained from such operation, use such surplus revenue, "first, to the payment in full, without giving preference, priority, or distinction to one bond over another of those hereby secured, of the interest due, if such net income be sufficient, but if not then *pro rata*." *Held*, that the only preference in making interest payments was given in case such payments could be made out of the earnings of the road, and that as to the fund realized on a sale of the property, interest past due at the time subsequently maturing bonds were, under an option in the deed, declared to be due, was not entitled to any preference or priority over the principal and interest so declared to be due.

APPEAL from two orders of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The petitioner, *Hanzlik,* by his first petition claims that he is entitled to interest upon certain coupons which had

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been attached to bonds issued by the defendant railroad company, and that past-due coupons are prior in right of payment to the bonds and coupons of later maturity. The bonds are secured by a trust deed. By a second petition he asks that an allowance of $450 be allowed him for services he claims to have rendered as manager of the defendant railroad.

The *Cazenovia & Sauk City Railroad Company* operated a short line railroad from Cazenovia to La Valle in Sauk county. The property of this railroad has been mortgaged to the *First Savings & Trust Company* of Milwaukee as trustee to secure certain bonds with attached interest coupons. Upon default in the payment of the interest the bondholders elected to declare the whole amount due and began foreclosure proceedings. C. E. Blake of Madison, Wisconsin, was appointed receiver and took possession of the company's property on June 30, 1913. The company's assets were sold at a receiver's sale. Prior to the discharge of the receiver and before the judgment of foreclosure the appellant filed two petitions demanding payment of interest coupons in his possession and $450 of unpaid salary as manager. He claimed to own certain bonds, and he separated the interest coupons past due from them and held the coupons as his property. He asked in his petition that he be awarded interest on the amounts of these coupons, so past due, from their maturity and that the amounts thereof be adjudged to be a prior lien upon the assets of the company, and that he have a preference for their payment over the bonds and coupons of later maturity. The circuit court denied this petition.

The petitioner in his second petition claims that he was director, treasurer, and general manager of the *Cazenovia & Sauk City Railroad* from July 1, 1912, until July 1, 1913, and that during such period he acted as claim agent, purchasing agent, and superintendent of roadway and improvements. He states that his salary was to be $100 per month and that

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there is due him the amount thereof from February 15, 1913, until July 1, 1913, namely, the sum of $450, and he asks that the receiver be directed to pay this out of the funds that he may have in his hands or which may come into his hands from the sale of said property or from the proceeds derived from the operation of the railroad. The circuit court found that the petitioner had breached his contract in that he did not perform the services required under his contract during the last six months preceding the receivership.

From these orders denying appellant's petitions this appeal is taken.

For the appellant there were briefs by *Carl N. Hill,* attorney, and *Frank W. Hall,* of counsel, and oral argument by *Mr. W. H. Spohn* and *Mr. Hall.* They contended, *inter alia,* that the petitioner was entitled to interest upon the coupons. In form each one is an obligation to pay money and contains all the essentials of a simple promissory note. It, as well as any other obligation, will bear interest from the date of its maturity or from the date upon which it becomes due and payable. *Mills v. Jefferson,* 20 Wis. 50, 54; *Cleveland v. Burnham,* 64 Wis. 347, 361, 25 N. W. 407; *Stubbings v. O'Connor,* 102 Wis. 352, 363, 78 N. W. 577. The coupons maturing in 1910, 1911, and 1912 take priority in the proceeds of the foreclosure sale over the coupons and bonds declared due by option at a later date. *Marine Bank v. International Bank,* 9 Wis. 57, 64; *Pierce v. Shaw,* 51 Wis. 316, 318, 8 N. W. 209; *Shaw v. Crandon State Bank,* 145 Wis. 639, 652, 129 N. W. 794; *Lyman v. Smith,* 21 Wis. 674; *McLean v. Hoehle,* 98 Wis. 359, 363, 74 N. W. 120.

For the respondents there was a brief by *Bentley, Kelley & Hill,* and oral argument by *F. R. Bentley.* To the point that all the bonds and coupons should participate in the fund and share *pro rata,* they cited *Sewall v. Brainerd,* 38 Vt. 364; *Smith v. Stevens,* 49 Conn. 181; *Jennings v. Moore,* 83 Mich. 321, 47 N. W. 127; *Holway v. Gilman,* 81 Me. 185,

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16 Atl. 543; 20 Am. & Eng. Ency. of Law (2d ed.) 1050; 2 Jones, Mortg. (6th ed.) §§ 1701*a*, 1703; *Bushfield v. Meyer,* 10 Ohio St. 334; *Champion v. Hartford Inv. Co.* 45 Kan. 103, 25 Pac. 590; *Haven v. Grand J. R. & D. Co.* 109 Mass. 88; *Union T. Co. v. M. & P. J. R. Co.* 63 N. Y. 311; *Miller v. R. & W. R. Co.* 40 Vt. 399; 8 Am. & Eng. Ency. of Law (2d ed.) 13, 14.

SIEBECKER, J. The appellant assails the finding of the circuit court to the effect that he breached his contract as general manager and for other services thereby required of him. An examination of the record discloses that the evidence bearing upon the question of his performance of the services required of petitioner under this contract is very meager and unsatisfactory. There is evidence tending to show that petitioner devoted some time and attention to the duties imposed upon him by this contract of employment, but it is not sufficient to establish the fact that he substantially performed the services required of him. The facts and circumstances in evidence show that he rendered comparatively little service from January 1 to July 1, 1913, and that he devoted but little time to the management and operation of the railroad business. The burden rested upon him to show that he performed his contract. The circuit court found on the facts and circumstances in evidence that he failed in this respect and that performance by him was not established. We cannot say that this conclusion of the circuit court is against the clear preponderance of the evidence. Upon the record the finding of the circuit court must stand.

It is contended that the circuit court erred in denying petitioner's recovery of the interest on the amount of each past-due interest coupon from the date of its maturity. There is no dispute but that this claim for interest on these coupons is for past-due unpaid interest. The question is, Is the petitioner in law entitled to interest on interest under the facts

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shown? The statute on the subject provides that the right to interest shall be limited to a sum or value not greater "than at the rate of ten dollars upon one hundred dollars for one year; and in the computation of interest upon any bond, note or other instrument or agreement interest shall not be compounded, nor shall the interest thereon be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith." Sec. 1689, Stats. 1913. This language is plain and its application to the undisputed facts before us is free from difficulty. Neither the coupons nor any other writing provides that interest due on the bonds shall bear interest from maturity. Furthermore, in computing the interest the statute inhibits the compounding of interest. The trial court was clearly right in denying this claim of the appellant. The early decisions referred to by counsel were not made under the law as it now exists and the allusion thereto in *Stubbings v. O'Connor,* 102 Wis. 352, 78 N. W. 577, shows that the court, under the statute as it then existed, did not allow interest on interest unless expressly agreed to in writing.

It is urged that the amounts due on coupons which matured prior to declaring the whole amount of the bonds due for default in payment of the interest thereon are to have preference in payment over subsequently maturing bonds and interest. The trust deed provides, pursuant to the resolutions of the board of directors, that it is given to secure the "*pro rata* payment, dollar for dollar, of said bonds and the interest thereon," and that such mortgage shall secure "equally dollar for dollar all of said bonds of all denominations without preference or priority of one bond over another. . . ." It is furthermore provided by the trust deed that if the trustee takes possession of the railroad and operates it, he may, after paying current operating expenses out of the revenue obtained from such operation, use such surplus revenue, "first, to the payment in full, without giving preference, priority, or

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distinction to one bond over another of those hereby secured, of the interest due, if such net income be sufficient, but if not then *pro rata.*" This provision is significant. It indicates that the only preference in making interest payments is given in case interest payments could be made out of the earnings of the road. This provision clearly shows an intention that the interest demands should have no preference or priority of payment out of the fund realized from the sale of the security. The provision of the trust deed above referred to in substance and effect provides for an equal and *pro rata* application of the amount realized on a sale of the security, as payment of principal and interest of the unpaid obligations, and negatives the claim that past-due interest shall have a priority or preference over any demand against said fund by reason of prior maturity. The circuit court construed the provisions of the trust deed correctly and properly denied petitioner's claim for a preference of payment of his interest coupons over the principal and interest declared due under the option in the deed.

By the Court.—The orders appealed from are affirmed.

JACOB, Administratrix, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

December 10, 1914—January 12, 1915.

Railroads: Duty to licensees or trespassers on trains: Injury to boy riding between freight cars: Negligence: Contributory negligence: Directing verdict.

1. Plaintiff's intestate, a boy sixteen years old, who had been riding in a dangerous position between two box cars drawn by a switch engine on a switch track, jumped or fell therefrom and was killed. There being no evidence sufficient to warrant the jury in finding that there was any negligence in operating the train or defect in the track which caused the injury, or that the boy

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was thrown or jarred from the train thereby, and it appearing from the undisputed evidence that he was himself negligent, a verdict for defendant was properly directed.

[2. Whether a railway company owes any duty to a mere licensee or discovered trespasser riding on its train, to keep its track in repair or observe statutory limitations as to speed within city limits, not decided.]

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

The plaintiff brings this action to recover damages for the death of her son, alleged to have been caused by the negligence of the defendant. The complaint alleges that the deceased was invited to ride upon defendant's freight train and took a position between two freight cars, ignorant of the dangers, and that the train was run at an unlawful rate of speed over a defective track and deceased was thrown off and killed. The answer sets up that deceased was a trespasser and was injured while trying to jump from a moving train, and denies generally the material allegations of the complaint. At the close of the evidence the court directed a verdict for the defendant, and ordered judgment for defendant dismissing the complaint. Judgment was entered accordingly and plaintiff appealed.

For the appellant there was a brief by *Mark Catlin,* attorney, and *Francis S. Bradford,* of counsel, and oral argument by *Mr. Bradford.*

Edward M. Smart, for the respondent.

KERWIN, J. The deceased was sixteen years of age, worked for the Standard Manufacturing Company in the eastern part of the city of Appleton, Wisconsin, and lived in the western part. Defendant's road ran to the place where deceased worked, and from there in a westerly direction to a point within a few blocks of where deceased lived. The train in question consisted of an engine and two box cars and was being operated upon a side or switch track. The switchman,

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Mike Crow, was in charge of the switch engine and two cars in question. Plaintiff offered evidence tending to show that Crow invited the deceased and three other boys to ride, and that they got on the cars in accordance with the invitation, deceased taking a most dangerous position between the two cars with his feet on the brakebeam under the car and holding on the handhold at the rear end with his hands; that the track was rough and out of repair and the train ran more than twelve miles an hour within the corporate limits of the city where deceased was injured.

While some of the witnesses testified in a general way that the train ran at a much greater speed than twelve miles an hour, it was established by their cross-examination and other credible, undisputed evidence and physical facts that the train at the time of injury was not running at a greater speed than twelve miles per hour.

Another ground of negligence charged was that a rail in the track was defective or broken. It is claimed that this broken rail was at the point of injury and caused the deceased to be thrown from the car and killed. On this point also there was not sufficient evidence to carry the case to the jury. The evidence shows without substantial dispute that the defective rail was some fifty feet beyond the point where deceased was killed, and moreover deceased was riding on the opposite side of the track from the defective rail and would not be affected by the jar of the car in running over the defective rail. It is also without dispute that the switchman, Crow, in charge of the train did not know of the dangerous position of deceased on the car.

The plaintiff offered some evidence that the switchman, Crow, invited deceased and three other boys with him to ride. This was positively denied by Crow. Moreover under the rules of the defendant in force at the time of the injury the switchman, Crow, had no authority to permit the boys to ride upon the train. It is also insisted by respondent's counsel

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that Crow had no apparent authority to invite or permit the boys to ride and that the boys were bound to know this, and several authorities are cited upon this point, among others *Driscoll v. Scanlon,* 165 Mass. 348, 43 N. E. 100; *Railway Co. v. Bolling,* 59 Ark. 395, 27 S. W. 492; *Bowler v. O'Connell,* 162 Mass. 319, 38 N. E. 498, 27 L. R. A. 173; *Clark v. C. & N. W. R. Co.* 165 Fed. 408, 19 L. R. A. N. S. 988; *Snyder v. H. & St. J. R. Co.* 60 Mo. 413; *Schulwitz v. Delta L. Co.* 126 Mich. 559, 85 N. W. 1075; *Sweeden v. Atkinson I. Co.* 93 Ark. 397, 125 S. W. 439.

It is argued that upon the undisputed facts and authorities cited the deceased was not a licensee, but a discovered trespasser, even if Crow's acts caused him to fall off, hence no duty rested upon the defendant or its servants except not to wantonly injure him. We do not find it necessary to determine this question.

The track in question was a switch track and not a part of the main line. The train was not a passenger train, but merely a switch engine used to switch freight cars into position. The evidence is clear and undisputed that deceased was guilty of contributory negligence. It is also clear that the evidence was not sufficient to warrant the jury in finding that there was any negligence in operating the train, or defect in the track, which caused the injury. Moreover, there is no evidence that deceased was jarred or thrown from the train because of speed or defect in the track. On the contrary, there is evidence that he was injured in jumping off. After the injury deceased stated that he fell while jumping from the train. There are also other circumstances which corroborate this evidence. So it appears that there is a lack of proof that deceased was thrown off, hence no liability on any theory of the case is established. *Shevlin v. American M. A. Asso.* 94 Wis. 180, 68 N. W. 866; *Breen v. I. C. R. Co.* (Iowa) 143 N. W. 846; *Stock v. Kern,* 142 Wis. 219, 125 N. W. 447; *Kaszubowski v. Johnson S. Co.* 151 Wis. 149, 138

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N. W. 54. Whether the defendant owed any duty to a mere licensee or discovered trespasser to keep its track in repair or observe statutory limitations as to speed within city limits we need not and do not decide.

It follows that the judgment below is right and must be affirmed.

By the Court.—The judgment is affirmed.

PETERSON, Respondent, vs. LEMKE, Appellant.

December 10, 1914—January 12, 1915.

Trial: Calling jury back to correct error in charge: Assault: Evidence: Sufficiency: Lack of corroboration: Burden and degree of proof: Instructions to jury: Appeal: Reversal without exceptions.

1. Before the jury returns its verdict the court may properly call it back to correct an erroneous charge.
2. In a civil action for an assault the uncorroborated testimony of the plaintiff may be sufficient to sustain a verdict in her favor.
3. In a civil action for an assault, where it was essential for plaintiff to prove that defendant had been guilty of a criminal act, it was error to charge that it was incumbent upon plaintiff to prove her case by a fair preponderance of the evidence only, instead of by a clear and satisfactory preponderance of the evidence; but no exception having been taken to such charge, and the real controversy having been fully tried, and it not appearing to be probable that justice has miscarried, this court declines, even under sec. 2405*m*, Stats., to reverse a judgment in plaintiff's favor.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Plaintiff brings this action to recover damages for injuries alleged to have been sustained as a result of an assault made upon her by the defendant on November 22, 1912. The complaint alleges that plaintiff is a married woman living with her husband, and that on said date the defendant assaulted her at her home and forcibly took hold of her for the purpose

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of compelling her to submit to sexual intercourse; that at said time plaintiff was pregnant; that she was greatly frightened, and as a result of the assault and her struggles to free herself from the defendant she thereafter suffered a miscarriage on December 11, 1912, and is still sick and disabled. The jury returned a verdict in favor of the plaintiff and against the defendant for $400 compensatory damages and $100 exemplary damages, and from a judgment entered in accordance with such verdict defendant appeals.

E. V. Werner, for the appellant.

P. J. Winter, for the respondent.

BARNES, J. Errors are assigned (1) in rulings on evidence; (2) in charging the jury; (3) in denying defendant's motion for judgment notwithstanding the verdict; and (4) in refusing to grant a new trial.

1. The errors assigned in rulings on evidence are frivolous and do not call for discussion.

2. It is claimed that the court erred in calling the jury back at the instance of opposing counsel and correcting an erroneous charge given on the subject of damages. The correction was favorable to defendant. Obviously it was not only the right but the duty of the court to correct its error before the jury returned its verdict.

3. Counsel argues that, the defendant having denied the assault, the verdict could not stand on the uncorroborated evidence of the plaintiff. This is an attempt to apply the rule applicable to a *particeps criminis* to one who has done no wrong whatever. Manifestly the jury had the right to believe the plaintiff and to disbelieve the defendant.

4. In addition to the reasons urged as stated above, it is contended that a new trial should have been granted because the court erred in charging the jury that it was incumbent on the plaintiff to prove her case by a fair preponderance of the evidence only.

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The instruction was not correct under our later decisions. The court should have advised the jury that it was incumbent on the plaintiff to prove her case by a "clear and satisfactory preponderance of the evidence." *Poertner v. Poertner,* 66 Wis. 644, 29 N. W. 386; *Maldaner v. Smith,* 102 Wis. 30, 78 N. W. 140; *Klipstein v. Raschein,* 117 Wis. 248, 252, 94 N. W. 63; *Harrigan v. Gilchrist,* 121 Wis. 127, 425, 99 N. W. 909; *Neacy v. Milwaukee Co.* 144 Wis. 210, 220, 128 N. W. 1063; *Trzebietowski v. Jereski, ante,* p. 109, 149 N. W. 743. There can be no doubt that it was essential for the plaintiff to show that the defendant had been guilty of a criminal act in order to recover.

If exception had been taken to this part of the charge, it is doubtful if it should or would be held nonprejudicial error. The plaintiff and the defendant were the only witnesses to the transaction and they contradicted one another flatly. There is certainly room for saying that the jury might have believed there was a fair preponderance of the evidence in support of the verdict reached and still it might not be satisfied that there was a clear and satisfactory preponderance.

The respondent invokes sec. 2405*m,* Stats., which permits this court to reverse without exception "where the real controversy has not been fully tried" or where "it is probable that justice has for any reason miscarried." This statute should not be construed as inviting the abandonment of taking exceptions. It is designed to meet cases where extreme hardship would otherwise probably result from a failure to take proper exceptions. It does not follow that, because a case would be reversed on an exception taken, it will be reversed under this statute without an exception. The trial court is entitled to know what fault is found with its charge, so that it may set the verdict aside if convinced that prejudicial error has been committed. The opposite party has a right to know, so that he may consent to a new trial if he is satisfied that error has been committed and wishes to save the

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delay and expense that would result from an appeal to this court.

Here the real controversy has been fully tried, so the first clause of the statute does not apply. We are not disposed to say that it is "probable" that "justice has miscarried" in this case, and hence must decline to reverse under the second contingency provided for in sec. 2405*m*.

By the Court.—Judgment affirmed.

STATE EX REL. SCHROEDER, Appellant, vs. FEUERSTEIN, Respondent.

December 10, 1914—January 12, 1915.

Quo warranto: *Complaint: Sufficiency: School district officers: Term of office: Statute construed.*

1. In a complaint in an action of *quo warranto* challenging defendant's title to the office of clerk of a school district, an allegation that the electors of the district cast 602 votes, of which defendant received 301, must upon demurrer be construed as equivalent to an allegation that 602 *legal* votes were cast and that the defendant received 301 *legal* votes; and, a majority of the votes cast being required to elect, such allegation also sufficiently shows, as required by sec. 3468, Stats. 1913, in what respect defendant's election was illegally declared.
2. Under sec. 431, Stats. 1913, providing that school district officers shall hold office for "three years and until their successors have been elected or appointed, but not beyond ten days beyond the expiration of their term of office without again being elected or appointed," the term of office of a school district clerk does not expire until his successor is elected or appointed, and he may hold for a period of ten days thereafter if his successor does not qualify within that time.

APPEAL from an order of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action of *quo warranto* challenging defendant's title to the

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office of clerk of school district No. 3 in the city of Appleton. The defendant demurred to the complaint because it appears upon the face thereof (1) that the court has no jurisdiction of the person of the defendant; (2) that the court has no jurisdiction of the subject matter of the action; (3) that the plaintiff is not the real party in interest and makes no claim of right or title to the office in question; and (4) that the complaint does not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer on the latter ground, and that is the only basis upon which the defendant seeks to sustain the court's ruling.

It appears from the complaint that plaintiff was a resident of and qualified elector in school district No. 3; that the defendant three years prior to July 7, 1913, had been elected clerk of said school district, and that pursuant to law an election on said last mentioned date was held to elect a successor to him because it was alleged his term of office would expire on that date. The material allegations of the complaint challenged by the last ground of the demurrer are these:

"That on the said 7th day of July, 1913, and in the evening of said date, the annual school meeting was held in and for said third school district of said city, at the place aforesaid, pursuant to law, for the election, among other things, of a school district clerk of said district, for a term of three years from said 7th day of July, A. D. 1913; that at and before said meeting there were three candidates for said office of school district clerk seeking the election of school district clerk before the electors of said annual school meeting of said district, viz. Mr. George C. Limpert, a Mr. Warmington, and *Charles A. Feuerstein,* defendant herein; and upon a vote being taken at said meeting by the electors thereof, for the purpose of electing a school district clerk from one of said candidates, one of said candidates, viz. Mr. George C. Limpert, received a total of two hundred and ninety-eight (298) votes, another of said candidates, viz. a Mr. Warmington, received a total of three (3) votes, and another of said candi-

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dates, viz. *Mr. Charles A. Feuerstein,* the defendant herein, received a total of three hundred and one (301) votes, and the total number of votes cast for school district clerk at said meeting were six hundred and two (602); that neither of said candidates at said meeting received a majority, as by law required, so as to elect him school district clerk at said annual school meeting, and that no school district clerk thereby at said meeting was elected; that thereupon and before an election of a school district clerk could be had by a majority vote, the chairman of said meeting, notwithstanding and disregarding said vote and the number of votes that each of said candidates received, and that no candidate had received a majority thereof, unlawfully declared said *Charles A. Feuerstein,* defendant herein, elected school district clerk, and the said meeting thereupon adjourned, notwithstanding the fact that he, the said defendant *Charles A. Feuerstein,* did not receive a majority of the votes cast, so as to entitle him to be elected as such clerk, and to authorize the chairman of said meeting, or any member thereof, to declare him, the said *Charles A. Feuerstein,* elected school district clerk for the ensuing term, as clerk of said school district; that neither of said other candidates withdrew their names, nor consented to said defendant's so-called election, as announced at said meeting; that thereafter no appointment of school district clerk has been made, as by law required, to fill such vacancy.

"That by reason of said unlawful proceedings aforesaid, and that said defendant herein did not receive a majority of votes cast for school district clerk, and was not thereby elected, the qualified electors of said school district No. 3 were and are deprived of their right of franchise to choose by their ballots, and thereby make choice, by majority vote, and to thereby select and elect a school district clerk of said district.

"That there now is a vacancy in the office of school district clerk of said district, and was prior to the commencement of this action, and that such vacancy has not been filled, as by law required, as plaintiff is informed and verily believes.

"That on and beyond ten days from the date when said *Charles A. Feuerstein's* office as school district clerk would expire, as aforesaid, the defendant, *Charles A. Feuerstein,* usurped and intruded into said office of school district clerk

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of said school district No. 3, and has ever since unlawfully exercised said office, and still holds the same, with the fees and emoluments thereof, and threatens to, and will unless restrained by court, collect, hold and receive the fees and emoluments of said office, and perform important duties in connection with said school district and in the management thereof, and enter into certain contractual relations, without authority in law, or by being duly authorized to do so."

Plaintiff appealed from an order sustaining the demurrer.

For the appellant there was a brief by *Lehr, Kiefer & Reitman,* attorneys, and *J. Elmer Lehr,* of counsel, and oral argument by *Leo Reitman.*

For the respondent the cause was submitted on the brief of *Francis J. Rooney* and *Francis W. Grogan.*

VINJE, J. Sec. 3466, Stats. 1913, provides that a private person may in the name of the state bring an action of *quo warranto* without leave of the attorney general when the office usurped pertains to a county, town, city, village, or school district. Complainant, therefore, is competent to maintain the action.

It is urged the complaint is defective because it does not allege the number of legal votes cast nor does it state in what respect the certificate of election of the defendant was improperly or illegally issued, as required by sec. 3468, Stats. 1913. The statement in the complaint that the electors of the district cast 602 votes, of which the defendant received 301, must upon demurrer be construed equivalent to an allegation that 602 legal votes were cast and that the defendant received 301 legal votes. The complaint, therefore, sufficiently shows in what respect defendant's election was illegally declared, for sub. (3), sec. 430, Stats. 1913, requires a majority to elect. It shows that defendant was declared elected upon less than a majority of the votes and for that reason he was not lawfully elected.

This brings us to the crucial question of the case, and that

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is, Does defendant lawfully hold over? Sec. 431, Stats. 1913, provides that school officers shall "hold their respective offices for three years and until their successors have been elected or appointed, but not beyond ten days beyond the expiration of their term of office without again being elected or appointed." Under the language of the above section is the term of office of a school officer "three years" or is it "three years and until their successors have been elected or appointed?" Clearly they cannot lawfully hold office more than ten days beyond their term. If the clerk's term of office was "three years," then he was unlawfully intruding into the office, for more than ten days had elapsed since his term expired. On the other hand, if his term of office was "three years and until his successor had been elected or appointed," then the complaint shows he is lawfully holding over, for it negatives an election or appointment of a successor to him. It must be confessed the language of the statute is not very clear and is susceptible of either construction. But in view of other statutory provisions relating to school officers we have reached the conclusion that the term of office of a clerk or director does not expire till his successor has been elected or appointed. The treasurer holds his office till his successor shall be elected or appointed and *qualified*. Sec. 443, Stats. 1913. A person elected to a school office has ten days within which to notify the clerk that he will not serve (sec. 431), and one appointed has five days in which to notify the clerk (sec. 433). No provision for a vacancy is made in case of a failure to elect, though provisions are made for other contingencies. See sec. 433*a*. In view of these statutory provisions it seems to have been the legislative intent that a clerk once duly elected should hold office till his successor is elected or appointed and for a period of ten days thereafter if his successor does not qualify within that time, but no longer without a re-election or re-appointment. This construction is in consonance with the provisions of sec. 443 relating to the treas-

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urer and prevents a vacancy in case of a failure to elect. It is also in harmony with the general rule that an officer hold his office till his successor is elected or appointed and qualifies. The reason for such a rule is that there may always be an incumbent to discharge the duties of the office.

Since the complaint shows that there was no lawful election of a successor to the defendant at the annual school meeting in 1913, he holds over by force of statute, and the demurrer was properly sustained.

By the Court.—Order affirmed.

WINSLOW, C. J., dissents.

JOHN A. TOLMAN & COMPANY, Appellant, vs. SMITH and another, Respondents.

December 10, 1914—January 12, 1915.

Guaranty: Assignment of liability: Action against principal debtor barred by limitation: Discharge of guarantors.

1. A bond guaranteeing repayment by an employee of advances made to him by his employer cannot be assigned generally so far as future defaults of the employee are concerned, but a cause of action which has already arisen in favor of the employer, and the liability of the guarantors on the bond so far as it protects that cause of action, are assignable.
2. Where a guaranty bond under seal provides that the sureties will themselves pay any amount which may become due from an employee to his employer under the contract of employment, the sureties are not discharged of liability on such independent promise by the mere fact that an action against the employee on the original debt is barred by the statute of limitations. [Whether a surety who makes simply a collateral agreement of guaranty would be discharged in such case, not determined.]

APPEAL from an order of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

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This is an action upon a sealed contract of guaranty. A demurrer to the complaint having been sustained, the plaintiff appeals.

The complaint alleges in substance that the John A. Tolman Company, an Illinois merchandising corporation, August 23, 1905, made a written unsealed contract with one Otto, by which Otto was employed as a salesman for the company on a commission of forty per cent. of the profits on the goods sold by him, provided that if he stayed with the company a year or longer and stood fifty per cent. of all losses from bad debts, then he was to have an additional ten per cent. of the profits, to be paid when the sales for the year should all be collected. Otto was to have no interest in the collections, accounts or moneys collected, and his earnings were only to be payable through the Tolman Company. He was to pay his own expenses, but the Tolman Company might at its option advance him money to defray his expenses, to be repaid on demand. He was also required to furnish a bond to secure payment to the Tolman Company of all moneys collected by or advanced to him and of all money and goods which the company might thereafter advance to him, and of all indebtedness then due or which might become due from him to the company, whether by the terms of the contract or otherwise.

The complaint further alleges that the defendants on the same day gave their bond under seal by which, after reciting the execution of the said contract of employment, they guaranteed payment by Otto to the plaintiff company of all moneys collected by him for the company, all advances made to him, and any indebtedness then due or which might thereafter become due from him to the company, waiving notice of acceptance of the guaranty, said bond containing also a provision that it should be a continuing guaranty and a provision that the sureties would pay any amount which should become due on the contract of guaranty at the company's office in

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Chicago. It was further alleged that Otto began his employment September 5, 1905, and became indebted to the Tolman Company between that date and February 6, 1906, for cash and certain other items in the sum of $821.30; that he was indebted on account of cash and other items prior to September 5th in the sum of $12.50, making a total of $833.80, upon which total sum there were credits amounting to $250.39, leaving a balance due of $583.41; that after said sum became due and on February 26, 1906, the said John A. Tolman Company sold, assigned, and transferred to John A. Tolman and Samuel A. Tolman "all, every and each of the assets of said company, bills and accounts receivable," and on the same day John A. Tolman and Samuel A. Tolman sold, assigned, and transferred to the plaintiff, *John A. Tolman & Company,* "all the cash, assets, merchandise . . . of John A. Tolman Company, together with all the bills and accounts receivable of said company," whereby the defendants became liable to pay to the plaintiff the said indebtedness of said Otto with interest.

For the appellant the cause was submitted on the briefs of *Albert H. Krugmeier,* attorney, and *Ashcraft & Ashcraft,* of counsel. They cited *Cunningham v. Norton,* 107 Cal. xvii, 40 Pac. 491; *Schoonover v. Osborne,* 108 Iowa, 453, 79 N. W. 263; 20 Cyc. 1431, 1435.

For the respondents the cause was submitted on the brief of *Francis J. Rooney* and *Francis W. Grogan.* To the point that the enforcement of a bond of guaranty is strictly a personal right and dies unless asserted in the hands of one for whose benefit it is primarily given, they cited 11 Current Law, 291; *Allen v. Camp,* 101 Tex. 260, 106 S. W. 315; *Barns v. Barrow,* 61 N. Y. 39; *Bennett v. Draper,* 139 N. Y. 266, 34 N. E. 791; Pollock, Contracts (7th ed.) 425; 2 Am. & Eng. Ency. of Law (2d ed.) 1018; *Levy v. Cohen,* 45 Misc. 95, 91 N. Y. Supp. 594; *People v. Backus,* 117 N. Y. 196, 22 N. E. 759.

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WINSLOW, C. J. The complaint alleges in substance that Otto went to work for plaintiff's remote assignor under an agreement to repay advances made to him; that at the same time the defendants under seal guaranteed the performance of that agreement; that a considerable amount of advances were thereafter made to said Otto by said remote assignor and became due; that thereafter all the assets, accounts, and bills receivable of the said assignor were sold, assigned, and transferred to third persons, who sold and transferred them to the plaintiff, and that the balance of said Otto's indebtedness is still due and owing to the plaintiff.

Wherein these facts fail to make a cause of action we are unable to understand. The indebtedness of Otto to the remote assignor existing at the time of the transfer of assets, together with the liability of the guarantors to pay that indebtedness if Otto did not do so, were clearly a part of the assets of said remote assignor, and were assigned and transferred by the two assignments set forth in the complaint and thus became the property of the plaintiff. The guaranty bond was not and could not be assigned generally so far as future defaults by Otto were concerned, but the cause of action which had arisen in favor of the remote assignor, and the guaranty bond so far as it protected that cause of action, were assigned. Being a cause of action which survives to personal representatives, it is on familiar principles assignable. *Webber v. Quaw*, 46 Wis. 118, 49 N. W. 830.

The defendants' agreement in this case not only contained a guaranty that Otto should pay his indebtedness, but a further provision that the sureties would themselves pay any amount which might become due on the contract. It is not necessary to consider, therefore, whether a surety who makes simply a collateral agreement of guaranty would be discharged of liability by reason of the fact that the statute of limitations had barred an action against the principal on the original debt. Here was plainly an independent promise and not

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merely a collateral agreement. It was under seal, and hence an action thereon is not barred until twenty years if the cause of action arose within the state, or ten years if it accrued without the state. Secs. 4220, 4221, Stats. 1913. In either event the time has not elapsed in the present case.

By the Court.—Order reversed, and action remanded with directions to overrule the demurrer to the complaint.

BIBELHAUSEN, Respondent, vs. BIBELHAUSEN, Executor, and others, Appellants.

December 10, 1914—January 12, 1915.

Husband and wife: Property rights: Antenuptial agreements: Validity: Public policy: Fraud: Burden and degree of proof: Consideration: Payment: Evidence: Presumptions: Statutes construed: Election by widow: Summons: Order for publication.

1. The fact that there were mutual promises of marriage preceding an antenuptial agreement as to property matters does not constitute a badge of fraud; much less is it, in itself, a ground for declaring the contract void as against public policy.
2. An antenuptial agreement whereby dower and other rights are released by the prospective wife must be free from fraud or imposition and will be regarded with rigid scrutiny, but the burden of proof is upon the party alleging fraud and it must be established by clear and satisfactory evidence.
3. Facts which might establish fraud in an antenuptial agreement between a young and inexperienced woman and a man of superior business acumen may be given much less weight where the parties were advanced in years, had been married before, and the second marriage was largely a business arrangement to secure a home.
4. If the minds of the parties met as to such agreement and they executed it understandingly, the mere fact that it was not as fair as it would seem to the court it ought to have been gives no warrant for disturbing it.
5. The right to make an antenuptial agreement settling property matters by treaty existed before the statute (secs. 2167–2171, Stats.) and was not taken away thereby. Such an agreement

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should not be confused with the legal jointure provided for in sec. 2167.

6. Sec. 2169, Stats., providing for the barring of dower by "any pecuniary provision which shall be made for the benefit of an intended wife," does not make it essential to the validity of an antenuptial contract that there be an adequate provision for support of the wife after the husband's death. Anything of value given as a provision satisfies the technical requirement.

7. An antenuptial agreement, executed by the intended wife only, by which, for a sufficient consideration paid or to be paid, she releases all future claims upon her intended husband's property or estate, including dower right, is not subject to an election by her not to be bound thereby. Sec. 2170, Stats., contemplates a conveyance made by the intended husband and not assented to by the intended wife, and is therefore inapplicable; as are also sec. 2172 and sub. 2, sec. 2172*a*, fixing the time for election.

8. In such an agreement the mention of the consideration and the formal acknowledgment of receipt thereof are mere recitals, not contractual in character, which may be explained or varied, but not so as to vary or defeat the instrument for the purpose for which it was given.

9. Even if the pecuniary consideration named in such an agreement was not actually paid at the time the agreement was made or thereafter during the lifetime of the husband, that fact does not, in itself, render the agreement void or affect it in any way as a surrender of marital rights in his property. The instrument, under such circumstances, will be construed as containing an implied promise to pay, which may be enforced.

10. Although in such case the widow might be precluded, under sec. 4069, Stats., from testifying as to the facts respecting payment of the consideration, no presumption of fraud should on that account be indulged in to avoid the agreement; but, in the absence of evidence to the contrary, the presumption should be that there was some understanding in respect to the matter consistent with the recital, as that the money to be paid was retained by the deceased for the wife at her request and as her trustee, possession by her to wait upon some future event which could not be postponed later than the *post-mortem* distribution of his estate.

11. In any event the rights of the widow in such a case become fixed at the time of the husband's death.

12. An order for publication of the summons in a divorce action, directing it to be published "for not less than once a week for six weeks," fixes the period of publication at six weeks, and is a sufficient compliance with sec. 2640, Stats.

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13. Although marriage itself is, under some circumstances, a sufficient consideration for a release by the intended wife of marital rights in the future husband's property, an efficient presumption of fraud may arise from a grossly inadequate or manifestly unfair pecuniary consideration for such release.
14. Circumstances bearing upon the question whether the pecuniary consideration for such a release is so grossly unfair as to give rise to a presumption of fraud include the age of the parties, their position in life, the reasonable expectations of a pecuniary nature surrendered, based not only on present possessions but also on the ability of the intended husband to acquire property, the needs of the intended wife, and the extent to which companionship and home life were the real inducement to the marriage without thought of property advantages.
15. Subsequent conduct of the husband may also be considered,—such as, in this case, the making of generous provision for the widow in his will by way of annuity and otherwise.
16. Testimony of one who signed an antenuptial agreement releasing her marital rights in the property of her intended husband, that when she signed the instrument she did not know what was in it, is of little weight in face of the presumption to the contrary, an entire absence of proof that any artifice was used to prevent her knowing the contents and clear testimony that the paper was explained to her before she signed, and the fact that she made no complaint about it until after her husband's death some eleven years later.
17. The fact that an antenuptial agreement, whereby the intended wife released marital rights in the property of the intended husband, in terms precluded her from making any claim upon his estate in the event of a separation after marriage, as well as in case of his death, did not render the release void as against public policy. [Whether the agreement would be binding on the wife in case of a separation, not decided.]
18. The right to make antenuptial agreements settling property matters in advance, while it should be carefully guarded against abuse, is a valuable personal right which should not be interfered with or regulated destructively, nor its exercise looked upon with disfavor.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Action impeaching the validity, on the ground of fraud, of an antenuptial agreement, and to have it and the record thereof canceled.

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The court found these to be the facts, in general effect: September 2, 1901, plaintiff and Joseph Bibelhausen, now deceased, without any preliminary arrangements as to property, mutually agreed to become man and wife. September 11th, thereafter, they visited the city of Milwaukee for the purpose of having their marriage ceremony performed. They went to the office of an attorney where plaintiff was procured to sign the paper sought to be avoided. It was in due form of an antenuptial contract and release by the plaintiff of all future claims upon her intended husband's property or estate, including dower right, in consideration of marriage and $500. The receipt of the money was acknowledged. The release was very comprehensive, precluding, if valid, plaintiff from making any claim of any character upon the estate of her intended husband, either in case of his death or the parties otherwise separating. Execution of the paper was witnessed and acknowledged so as to entitle it to be recorded in the office of the register of deeds.

After execution and delivery of the paper the parties were married. Plaintiff confided implicitly in her intended husband. She was a woman of but little business experience. She owned a house and forty acres of land and some personal property worth some $800. Shortly after the marriage such property was conveyed to Mr. Bibelhausen who, later, sold the same and had the benefit of the proceeds. On the day of the execution of the agreement, Mr. Bibelhausen, in the absence of his intended wife, caused the instrument to be prepared ready for signature. The pecuniary consideration in it was never paid. Plaintiff did not see the instrument, after its execution, during the lifetime of Mr. Bibelhausen. He kept it, though, about the time he made his will, he caused it to be recorded in the office of the register of deeds of the county where the parties resided. No provision of any kind was made by him for plaintiff, outside of such agreement, prior or subsequent to the marriage, except by will. The in-

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strument contained no promise on his part and was not signed by him. It was an agreement on her part, in consideration of marriage and $500, acknowledged to have been paid, to make no claim upon Mr. Bibelhausen's property or estate in case of his death or the parties otherwise ceasing to be husband and wife or ceasing to live together as such, and renouncing all property rights which she might, in the absence of the renouncement, acquire by the marriage which was in contemplation. He died testate November 23, 1912. His will was dated December 31, 1910. The parties lived together as man and wife, continuously, from their marriage until the death occurred. The will was duly admitted to probate. It disposed of real and personal property of approximately $13,000. He left surviving, besides plaintiff, a son and two grandchildren. Their relationship to him was through a former marriage. He made these provisions for plaintiff, including the general direction for precedent payment of his debts not excepting any existing in her favor under the antenuptial agreement: "All the household furniture, goods and effects of every kind and nature absolutely" and $15 per month for life. The use of the homestead, describing the realty and the buildings thereon, to be free from all taxes, general and special, and insurance. Prior to the death of Mr. Bibelhausen, he sold the property so willed to plaintiff for a home and removed to another place which passed by the will, but not to plaintiff. The statutory time for election not to take otherwise than under the statute has not expired. Mr. Bibelhausen possessed some property at the time of the marriage.

On such facts the conclusion was reached that the agreement was contrary to public policy and void.

The trial judge filed an opinion and, as seen, probably, by the cast of the findings, allowed counsel for the prevailing party to prepare them. In the opinion doubt is expressed as to what to call the agreement; and it is said that, in substance, Mr. Bibelhausen purchased in advance his freedom from

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plaintiff as to property rights, in form, for $500, which he omitted to pay; that the marriage, under the circumstances, became a matter of bargain and sale, rendering the agreement void as against public policy, though there may not have been any actual fraud or deception; that plaintiff either did not consent to the arrangement, stated in the instrument signed by her, or her consent was obtained under such circumstances as to render it nugatory; and that there was, in reality, no such antenuptial pecuniary provision as is contemplated by sec. 2169, Stats.

The following not covered significantly, if at all, by the findings, appears by the evidence: Both parties were past the meridian of life when the marriage took place. Each had been previously married and been divorced. He was fifty-three years of age and had a son twenty-four years old. She was forty-nine years of age and the mother of five children, three being of full age and the others seventeen and fifteen years of age respectively. The parties were in substantially the same station in life. They were quite equal in intelligence and freedom from dependence upon entering into marriage relations. There was no effort on the part of Mr. Bibelhausen to obtain the signature of plaintiff to the contract against her will. When she visited the lawyer's office to sign it she knew the purpose of the visit. The lawyer who drafted the paper was a reputable member of the legal profession and did nothing to induce plaintiff to execute the paper. He read it to her, she was made, as he supposed, to know what it meant, and signed it without coercion, but with the understanding that it was essential in order to have the contemplated marriage take place.

For the appellants there was a brief signed by *Eberlein & Eberlein,* attorneys, and *H. O. Buth,* guardian *ad litem* for *Esther C. Bibelhausen* and *Roy J. Bibelhausen,* and oral argument by *Albert S. Larson.*

P. J. Winter & E. V. Werner, for the respondent.

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MARSHALL, J. It is somewhat difficult to discover the exact logic of the court's conclusions. It is claimed, and not denied, that the findings were prepared by counsel for the prevailing party. There is evidence of that in the amount of unnecessary matter contained therein and a somewhat nonjudicial form of expression which, to my mind, takes very largely from the respect which findings of fact, judicially and judiciously prepared, are entitled to have. If counsel are permitted to draw the findings and choose the language with which to clothe a judicial determination, I suggest that the most careful attention should be devoted to the work to avoid giving the result a partisan and nonjudicial cast.

The learned court characterized the agreement as making the marriage state a matter of bargain and sale, as if the antenuptial contract were void as matter of public policy, or at least, to be avoided if practicable, rather than sustained. The fact that there were mutual promises of marriage preceding an arrangement as to property matters, was given special significance. That is commonly the case. It does not constitute, even a badge of fraud, much less, in itself, ground for declaring a contract void as contrary to public policy.

While it is true that the circumstances characterizing the making of an antenuptial contract, where there is anything suggesting unfairness in the property provision, are to be scrutinized with care and the agreement held void if it was not freely and understandingly entered into, to challenge validity is to allege fraud and that the instrument was the result thereof. In such a case the burden to establish fraud is on the party alleging it, and such burden can only be efficiently lifted by clear and satisfactory evidence. The mutual intentions of the parties, in such circumstances, are just as binding as is any other agreement. There is nothing inherently suspicious or bad about such an agreement. The contrary logic in the findings is wrong as decidedly shown by the decisions of this court. *West v. Walker,* 77 Wis. 557, 46 N. W. 819; *Deller v. Deller,*

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141 Wis. 255, 124 N. W. 278; *Oesau v. Estate of Oesau,* 157 Wis. 255, 147 N. W. 62.

True, an agreement whereby the future wife releases her claim to her right of dower and other rights in the estate of her future husband, must be free from fraud or imposition, and is to be regarded with rigid scrutiny, and will not be approved where it appears that the future wife was overreached or induced by false representations to make the contract. But deception and false representations are not to be presumed and found without evidence. Such characteristics must be affirmatively established and clearly so. The presumptions are rather against such reprehensible conduct than the contrary, though they may be circumstantially so established. Events which would so establish such elements in case of a young and unexperienced person on the one side and a person of superior business acumen on the other, or where the inducement to marriage on the woman's side was largely financial and companionship in the marriage relation with the home life were secondary, might overcome the *prima facie* effect of the executed contract, would not when the advantage of the latter being the main thing, as in case of a person circumstanced as the parties were in this case.

As said in *Oesau v. Estate of Oesau,* the overshadowing thing in dealing with such a contract as the one before us, is the intent of the parties at the time of making,—whether their minds met in respect to what was embodied in the paper, and they executed it understandingly. If such were the case, the mere fact that the agreement was not as fair as it would seem to the court it ought to have been, gives no warrant for disturbing it.

Parties have the same right to make such a contract as the one in question as to make any other. It is just as much within the protection of the fundamental law as any other, where there is no statutory disability. There is no interfering unwritten law nor public policy of written law here, con-

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demning it. On the contrary, the statute recognizes the right to make such, and merely regulates exercise of the right for purposes of conservation and fairness. Sec. 2169, Stats. Decisions made here and there casting discredit on efforts of the kind, do not voice the prevailing judicial sentiment, nor that of this court. In *Oesau v. Estate of Oesau, supra,* the court said:

"There is nothing inherently suspicious about antenuptial contracts. They are, in the absence of unfair characterizing circumstances, to be regarded with favor rather than disfavor. In general, the burden is upon the one impeaching such a contract to support the claim of invalidity rather than upon the adversary to support the contrary. If there is anything about such an instrument, considering all the circumstances, indicating that the intended wife had been unduly influenced to make it, that will overcome its *prima facie* validity, so as to require the person asserting the contrary to, at least, restore such character."

That expression was based on principle and authority, as the following illustrations of many which might be given, will abundantly show:

In *Kennedy v. Kennedy,* 150 Ind. 636, 50 N. E. 756, the contention was made, as here, that the contract was void because not answering to the technical requirements of a jointure under the statute requiring conveyance to an intended wife of real estate, to take as purchaser for *postmortem* enjoyment. The statute was similar to ours. The court responded, in terms or effect, to the claim that the instrument did not satisfy the statute:

"The case . . . is not one of a settlement or jointure under the statute, but is simply an antenuptial contract. . . . The right of an adult intended husband and wife in contemplation of marriage, to intercept a statutory line of descent, or the rights conferred by law, and substitute by contract, or agreement, a rule of inheritance of their own creation, by which their respective rights in the property of each other may be measured or determined, is a well settled principle. . . . In

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fact, no principle seems to be more firmly settled at the present time than that an adult woman, before her marriage, may bar her legal rights in her husband's estate by her agreement to accept *any other provisions* in lieu thereof."

Note the language "any other provisions."

"And such an agreement will be upheld and enforced by the courts in the absence of fraud or imposition upon her, and where it may be said, under the particular circumstances, that it is not unconscionable. . . . The rule by which we must be controlled in the interpretation of this contract is that which is applicable to any other contract. . . . It must be considered, not in fragments, but as an entirety, and the intention of the parties ascertained through the words they have used. To ascertain their intention, regard should be had to the character of the instrument, the condition of the parties, and the object which they had in view."

The same court in *Buffington v. Buffington,* 151 Ind. 200, 51 N. E. 328, said:

"Antenuptial contracts are not in such disfavor as to require rigid construction. On the contrary, they are favored by the law as promoting domestic happiness and adjusting property questions which would otherwise often be the source of fruitful litigation."

No formality is required, and the purpose of construction is to ascertain and give effect to the intention of the parties.

The same sentiment was expressed by Judge ELLIOTT in *McNutt v. McNutt,* 116 Ind. 545, 19 N. E. 115, adding:

"The truth is, it is exceedingly difficult to imagine why, in any case where there is no fraud, courts should displace the judgment of contracting parties and substitute their own. No persons in the world can so well and so justly judge as the contracting parties themselves, and it is only in the strongest and clearest cases that courts should disregard their judgment, and never where there is neither positive wrong nor a fraud."

To the same effect are the following, among many at hand: *Barth v. Lines,* 118 Ill. 374; *McGee v. McGee,* 91 Ill. 548; *Weaver v. Weaver,* 109 Ill. 225; *Naill v. Maurer,* 25 Md.

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532; *Jenkins v. Holt,* 109 Mass. 261; *Freeland v. Freeland,* 128 Mass. 509; *Andrews v. Andrews,* 8 Conn. 79; 14 Cyc. 939.

The fact that some judicial sayings are contrary to the foregoing does not make the law. It is the prevailing rule, in general, if reasonable, which should be taken as the unwritten law, and must be, when incorporated into our system of jurisprudence by considerate adjudication.

Our statutes, secs. 2167 to 2171, are similar to those in most states. Secs. 2167 and 2169, providing for what is commonly denominated "legal jointure," should not be confused with the right to make a mere antenuptial agreement settling property matters by treaty, before marriage. That right existed before the statute and was not taken away thereby, but rather recognized and encouraged. Failure to appreciate this has made it necessary for many courts to deal with the subject as indicated in the cases cited. This is deduced from the weight of authority in the text of Cyc. cited: "The provisions of a statute that a jointure is a bar of dower do not ordinarily deprive an intended wife of the power to bar her dower by any other form of antenuptial contract." 14 Cyc. 940. That is, of course, provided regulations as to execution are complied with.

There is no reason now, if there were in former times, for judicially creating a disability to settle property matters by antenuptial contract, in view of the common-law disability of women as to business matters having been substantially removed, leaving her as free in that field as if not married. Under our present system of written law, a married woman is given an individuality of her own,—in some respects of greater significance, as to property, than that of her husband. No less freedom of action should be accorded to the woman candidate for marriage.

"The statutes of most of the states now make the wife as free and independent in the control of her property as the

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husband is in the control of his property. As a result of this legislation, the tendency of the modern decisions is to uphold antenuptial contracts made fairly and without fraud by adult, single women." *Barth v. Lines,* 118 Ill. 374.

And that is, especially, true where the parties to the contract were advanced in years, had been married before, and the second marriage was largely a business arrangement to secure a home.

It is suggested that sec. 2169, Stats., which recognizes the right to make an antenuptial contract by using the term which is a mere recital of the common law, "any pecuniary provision which shall be made for the benefit of an intended wife," etc., created a disability to make such a contract without an adequate provision for support of the wife after the decease of the husband. Such has not been the rulings of courts, in general, if at all, under similar statutes. They are to the effect that such statutes do not change the law and only contemplate a consideration sufficient to avoid any presumption of fraud from the meagerness or want of it, and to make a substantial basis for the release of marital property rights. Anything which answers to the call for a "provision," is sufficient. *Barth v. Lines, supra; Andrews v. Andrews,* 8 Conn. 79; *Wentworth v. Wentworth,* 69 Me. 247.

Where both parties have property and it is stipulated that each shall retain the individual possession with all rights the same as if unmarried, that is sufficient as held in *Oesau v. Estate of Oesau,* 157 Wis. 255, 147 N. W. 62, and cases heretofore cited. Even if the pecuniary consideration named shall not have been paid, if there is in fact an obligation to pay, that is sufficient. Where there is neither payment nor obligation to pay a different rule might well apply. *Freeland v. Freeland,* 128 Mass. 509.

This court dealt with the subject of "provision" when used in a statute as a condition, in *In re Donges's Estate,* 103 Wis. 497, 79 N. W. 786. Anything of value given as a provision

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satisfies the technical requirement. Michigan, Illinois, and many other states, hold—in harmony with courts dealing with the particular class of situations—that any provision which the adult agrees to accept is a "provision." That satisfies all requisites of validity. Whether the provision is so meager or so characterized as to raise an inference of fraud, is another question.

The learned court held that the contract in question was within sec. 2170, making validity of the agreement dependable upon assent to be bound by it having been given after the death of the husband. No reason is perceived for that holding. If plaintiff, without efficient fraud, assented to the agreement—as she *prima facie* did by the fact of her having signed it, she is bound thereby. If she did not so assent, it is void for the fraud. The statute does not deal with such a contract as the one here.

So it seems that the entire logic of the legal conclusions complained of, is very infirm. There is no finding that the making of the instrument was characterized by fraud. The court rather so suggested in the opinion. No misrepresentation as to property or otherwise, was claimed or proved. There was no proof that respondent did not voluntarily make the agreement. The evidence is that the paper was read to her, that she was probably made to understand its contents, and doubtless understood fully its object and agreed to it. Care, *ex industria,* was exercised to see that she was not imposed upon. The attorney, who supervised the matter, testified:

"I prepared the instrument and got them married. I believe Mr. Bibelhausen came here about half-past 8 in the morning alone. He came up there and asked me to prepare this jointure. He gave me the terms. Then she came up with him to sign it. My recollection is that I read it over to her. I am satisfied she knew what she was doing. It is my practice to satisfy myself before taking an acknowledgment that the parties understand and know the contents of

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the instrument. I did that in this case. As I remember, the instrument was fully explained and read over to the parties. This is the form we used at the time and have used a number of times since, where the formal consideration is named and where it simply says it has been paid."

He further testified that there was no money paid in his presence; that after the instrument was executed he assisted the parties to obtain a special permit to get married and then accompanied them to the St. Charles Hotel where Judge NEELEN performed the marriage ceremony. There was no other evidence of the circumstances leading up to the making of the paper or characterizing its making, or that any fault was found with it by reason of nonpayment, at the time of its execution or theretofore, of the $500.

During the lifetime of Mr. Bibelhausen respondent made no complaint. The whole course of events suggests, clearly, that she willingly made the paper because she wanted to enter into the marriage relation with Mr. Bibelhausen without any particular reference to prospective property advantages.

Evidently $500 was to be paid as respondent's share of Mr. Bibelhausen's estate. The agreement must be viewed from the aspect of things when it was made. Then the deceased had very little property. If it be valid it constitutes an obligation against the estate. The expression, in form, of present payment, without explanation, is an inadvertency, probably caused by use of a form without inquiring into the circumstances. Evidently, what Mr. Bibelhausen intended to do, was to take a release and preserve his existing right to control and dispose of his property by will or deed as he might see fit, in consideration of $500, either to be paid when his intended wife desired, or out of his estate, and, the agreement having been fully executed, except, possibly, payment of the money, it is not impeachable under our statutes of fraud.

The circuit court misapprehended the law by holding that

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the instrument was untainted with fraud, yet merely because of the consideration not having been paid, that it is within sec. 2170, Stats., dealing with jointures properly executed but not assented to by the intended spouse at the time of execution or during the lifetime of the husband, and holding that the consideration could be impeached for the purpose of evading the agreement. As we have seen, the instrument is not within the statute, which contemplates a conveyance made by the intended husband and not assented to by the intended wife. This is a release of prospective advantages, assented to by the intended wife. There can be, as before indicated, no question as to her efficient assent except upon the ground of utter invalidity because of fraud, of which there is no evidence.

It is elementary that, in determining the intent embodied in an instrument, it is to receive a construction, if practicable, which will sustain it and render it reasonable, rather than one which will defeat or render it unreasonable. It is also further elementary that, in the absence of fraud, neither inadequacy nor failure to pay the consideration named in a specialty, can be contradicted for the purpose of defeating it. The consideration may be explained. It may be shown to be other than stated. It may be shown to have been partly paid only, or not paid at all, without any effect upon the validity of the instrument. If partly or wholly unpaid, the instrument, under the circumstances, will be construed, as containing a promise, by implication, to pay, which may be enforced. Those principles are so firmly entrenched in the unwritten law, and so fully demonstrate that the decision complained of is wrong, so far as based on the mere nonpayment of the $500, that lengthy discussion of the matter is needless. The following, including authorities cited by appellant's counsel, fully cover all phases of the subject: 3 Washb. Real Prop. (6th ed.) § 2281; 2 Devlin, Deeds (3d ed.) § 834; 13 Cyc. 535; Jones, Ev. (2d ed.) § 470 (477). Cases referred to in

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the notes to these citations: *Haslam v. Jordan,* 104 Me. 49, 70 Atl. 1066; *Spence v. Central Acc. Ins. Co.* 236 Ill. 444, 86 N. E. 104; *McGee v. Allison,* 94 Iowa, 527, 63 N. W. 322; *Luckhart v. Luckhart,* 120 Iowa, 248, 94 N. W. 461; *Maxwell v. McCall,* 145 Iowa, 687, 124 N. W. 760.

The precise principles last discussed do not appear to have been heretofore a matter of adjudication in this court, though they are so well established that, it is probable they have been applied, to a more or less extent, in many instances. The general doctrine as to such unilaterally executed documents as the one before us, will be found stated, frequently, in substance, that the mention of a consideration, in an instrument executed by the party to whom it purports to have moved for the thing conveyed, and the formal receipt, are mere recitals, not contractual in character, and may be explained or varied; but not so as to vary or defeat the instrument for the purpose for which it was given. As to such purpose, and that only, in the absence of efficient fraud, the person executing the paper is estopped from contradicting the recital. *Hannan v. Oxley,* 23 Wis. 519; *Morgan v. South Milwaukee Lake View Co.* 97 Wis. 275, 72 N. W. 872; *Mueller v. Cook,* 126 Wis 504, 105 N. W. 1054; *Jost v. Wolf,* 130 Wis. 37, 110 N. W. 232; *Ill. S. Co. v. Paczocha,* 139 Wis. 23, 119 N. W. 550. Thus concisely the rule is stated in *Jost v. Wolf:*

"The recital that there has been paid a consideration, and what that consideration was, is merely a statement of a fact theoretically necessary to exist in order that the conveyance might take effect, but which early became practically a mere immaterial fiction by reason of the rule that the grantor's seal raised a conclusive presumption of a consideration sufficient to support the instrument. Hence one cannot deny existence of some consideration in order to defeat the conveyance. To that end, however, the correctness of the recital was and is wholly immaterial, and the authorities, practically without exception, recognize that it binds no one as to its correctness, but may be proved, *aliunde,* to have been greater or less or

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different in character, as property or services instead of money, and the like, so long as it is not inconsistent with the existence of some consideration to support the conveyance."

The doctrine above discussed was applied in *Maxwell v. McCall,* 145 Iowa, 687, 124 N. W. 760, precisely as it has been suggested here, this being the expression of the court on the subject:

"The deed recites a consideration of $100. This sum was not in fact paid. . . . It is well settled that the recitals of consideration in a deed may be explained by parol evidence. It may be shown that the consideration was either greater or less than, or different in form from, that stated in the deed. . . . Notwithstanding this liberal rule concerning the consideration, it is also well settled that it is not competent to contradict the deed to the extent of showing there was no consideration for the purpose of defeating the instrument, in the absence of fraud or mistake. *It is to be noted further that* a recital of a consideration in a deed makes a *prima facie* agreement on the part of the grantee, in accepting the deed, to pay such consideration and he may be sued therefor."

Now, assuming that the evidence is sufficient to support the finding of fact that the consideration of $500 was not actually handed respondent at the time the antenuptial agreement was made, or thereafter within the lifetime of Mr. Bibelhausen, it does not, of itself, render such agreement void or affect it in any way as a surrender of marital rights in his property. It is doubtful whether the mere evidence of respondent that she never had $500 at one time, or the want of written evidence that such amount was parted with by Mr. Bibelhausen, or other mere circumstances relied on, are sufficient to overturn the *prima facie* effect of the paper, which should stand except in face of clear and satisfactory evidence. For aught that appears respondent might have expressly deferred payment, or left the money in the hands of Mr. Bibelhausen for her use, or it may have been the understanding that payment should wait upon his death or the contingency mentioned in the

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paper; or the sum of $500 might have been a mere money measurement of something of a different character which was the real consideration. We cannot tell, because death has closed the mouth of one of the parties to the transaction and the law has closed that of the other. The circuit judge rather unfavorably reflected on this statutory rule. The rule should not be looked upon with disfavor, nor should a presumption of fraud be indulged in to avoid its effect. It is quite as important not to blacken the character of the dead, as to conserve the interests of the living. The settled law should not be disturbed nor overlooked for either purpose. The presumption, in the absence of evidence to the contrary, should be indulged in that, if the consideration of $500 was not paid, there was some understanding in respect to the matter consistent with the recital. The most natural presumption is, if the court below decided rightly at this point, that the deceased retained the money for respondent, at her request, and as her trustee, possession of it to wait upon some future event which could not be postponed later than the *postmortem* distribution of Mr. Bibelhausen's estate.

The court assumed to pass upon the question of when the period would expire for respondent to take under the will or under the instrument in question. That assumption arose from the erroneous idea that the agreement was within sec. 2170, relating to provisions made before marriage, not assented to by the intended wife, or made afterward with such consent. This was neither. Therefore sec. 2172, fixing the time for election at one year after filing of the petition for settlement of an estate, does not apply, nor does ch. 394, Laws of 1913, providing (sub. 2, sec. 2172*a*, Stats. 1913) that the period occupied in judicially contesting the validity of the provision characterized by the right of election, shall not count in the time fixed therefor, change the situation. We may well say, in passing, that, since there is no contest of the validity of a will involved in this case, the time for election as to the particular will, is governed by sec. 2172 and expired

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in one year after filing of the petition for its probate, viz. November 29, 1913. Moreover, it is considered that, in any event, the rights of respondent became fixed at the time Mr. Bibelhausen died. They could not be changed thereafter any more to her advantage than to her prejudice. The beneficiaries then became absolutely entitled to the estate, according to the terms of the will, subject to such rights as existing law afforded respondent. That, to all intents and purposes, was incorporated into the will and, as an entirety, made a legal and binding disposition of the estate.

Some question is raised as to the validity of the marriage between respondent and Mr. Bibelhausen, because in the divorce proceedings between respondent and her first husband, jurisdiction to render the judgment was referable to an order of publication directing the summons to be published in a particular newspaper "for not less than once a week for six weeks," using the words of the statute. It is suggested that since the statute requires such a summons to be published for such length of time as shall be deemed reasonable, "not less than once a week for six weeks," it is vital to have the precise period of publication specified. That is extremely technical. Strict compliance with the statute, does not preclude reasonable compliance, within a sensible meaning of language, being sufficient. While it may be well to specify the precise time for a publication, as in the form to which reference is made by counsel, the words "not less than six weeks," used in the order, plainly, fixed the period of publication at six weeks, though additional publications would not affect the validity of the service in such a case.

The rule must be recognized that an efficient presumption of fraud in obtaining, by an intended husband, a release from his intended wife of marital rights in the future husband's property, may arise from a manifestly inadequate pecuniary provision in lieu thereof. That is a companion to the rule that marriage itself, under some circumstances at least, is a sufficient consideration to support the contract. A sufficient

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consideration is one thing, and such an unreasonable consideration as to appear manifestly unfair and call for explanation, is another. The latter may so far impeach an otherwise valid antenuptial contract as to defeat it on the ground of fraud, unless the *prima facie* case thus made against the instrument is sufficiently rebutted as to leave the proof of deception or undue influence not sufficiently probative to rise to the dignity of that clear and satisfactory proof, essential to convict one of having perpetrated a fraud.

The question last suggested does not seem to have received attention of the trial court. That it was unappreciated seems clear from the circumstance that the court suggested, upon proof being offered respecting the property of Mr. Bibelhausen at the date of the agreement, that it was quite immaterial. There was an offer to prove that he spent most of his money in getting a divorce and had left only a building in the city of Shawano, used for a saloon business, and some little machinery,—and the evidence was rejected. It must be assumed, that the offered evidence would have established what was claimed, supporting the presumption, nothing appearing to the contrary, that the money consideration named in the agreement, was not grossly unfair in view of all the circumstances.

The circumstances referred to, include many things besides the property possessed by the intended husband; among them, the age of the parties, their position in life, the reasonable expectations of a pecuniary nature surrendered, based on present possessions, the ability of the intended husband to acquire property, his habits, his family, the needs of the intended wife, having regard for her age, her family supports and burdens, whether the prospective property advantages were of little consequence, and the companionship and home life in the family relations were the real inducement to marriage without thought of property advantages.

Applying the foregoing, the money consideration named in

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the agreement does not appear so small as to overcome its, otherwise, *prima facie* fairness, and raise an efficient inference of fraud.

The fact that respondent testified that when she signed the instrument she did not know what was in it, counts for little, in face of the presumption to the contrary, the entire absence of proof that any artifice was used to prevent her from knowing its contents, and the clear testimony that the paper was explained to her before she signed it and she made no complaint about it until some eleven years had expired and Mr. Bibelhausen had passed away. She was conscious, all the time, of its existence. For some two years it had been a matter of public record, and its general effect she must have known. Indeed, there is no evidence that she did not.

We may say, in passing, that it is not clear whether respondent's evidence which had to do with the transaction at the time she signed the instrument, was intended to be excluded. It was closely connected with proper rulings to that effect, made after a question had been answered, or partly so. But, giving what she said all the effect which it could fairly have, it does not prove want of knowledge of the purpose and substance of the paper; but does indicate that she was indifferent as to the pecuniary matter, incident to the proposed marriage, and was intent only upon the other advantages of the marriage state. Considering her family of children, nearly all of earning capacity, and her property, she appears to have been on about an even plane with Mr. Bibelhausen. Both being divorcees, each with a grown-up family, children of the prospective marriage not probably to be expected, the intended husband past the better part of an ordinary business life without having accumulated property of any consequence,—the pecuniary consideration does not look strikingly unfair, if unfair at all. Subsequent conduct in such a case may be considered. That is well illustrated by *Smith's Appeal,* 115 Pa. St. 319, 8 Atl. 582, where the intended wife was given about

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$12,500 out of about $179,000; but, on account of after-acquired property of some over $200,000, $15,000 more was given by will. In view of such testamentary treatment it was held that there was no presumption of fraud arising from the smallness of the first provision.

In this case the great bulk of the property possessed by Mr. Bibelhausen at the time of his death was acquired after his marriage with respondent. Instead of standing on the antenuptial agreement, wholly, as he might have done, and probably would have done had he harbored a thought of dealing unfairly with respondent, he provided for her very generously, considering the fact that he left her free to claim payment, as we shall see later, of the $500, if it had not been paid, and payment of all other money held by him in trust for her; and, further, since he had a son of mature years, in whom he evidently, had great confidence and for whom he had much respect, and two grandchildren, to whom he, obviously, was warmly attached.

Besides leaving respondent unembarrassed as aforesaid, on the faith of which she has filed a claim, as appears, in the administration proceedings, for $2,339.56, which seems to be waiting for final hearing upon the disposition of this case,—he made these provisions for her: *first*, an express preference of claims of creditors over all devises and bequests; *second*, all his household furniture, goods, and effects of every kind and description to have and to hold as her own separate property; *third*, an annuity of $15 per month during her natural life; *fourth*, a life estate in the homestead property free from taxes, general or special, and expense of insurance, such taxes and insurance matters to be a charge on his whole estate; *fifth*, $500 in trust for use in securing for her necessary medical care and attention; *sixth*, $100 in trust for use in defraying her funeral expenses. To insure the faithful execution of such trusts he made his son trustee of his estate. All things considered, the will is quite a model. It was made after some nine years of married life and was left unchanged for the

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period of some two years which elapsed thereafter before his death. It evinces the most perfect satisfaction with the marital union and most tender regard for the future of his companion, and confidence in his son that such regard would be vindicated to the end. The aggregate of the express bequests, aside from the advantage of laying claim for any money due respondent, is some $5,000. The annuity, use of the homestead, and the ownership of the house belongings would make some $400 per year. Respondent was sixty years old, or thereabouts, when the will took effect. The value, *in præsenti,* of such an annuity is around the sum named, measured by the tables of reputable life insurance companies—or more than one third of the whole estate. Add thereto the possibilities as to the claim of respondent yet to be heard in county court, and somewhere around two fifths or half of the estate may go to respondent.

On the whole, it seems that respondent acted understandingly when she made the agreement in question, and made no mistake in respect thereto or in the union of her destiny with that of the deceased. She evidently was pretty capable of taking care of her own affairs. Having reared five children, all or nearly all to maturity, had many years of married life with her first husband, secured a dissolution of an unsatisfactory matrimonial contract with him and, incidentally, obtained a substantial property which she managed with her family affairs,—she must be regarded as having been of more than average business ability for one in the station of the parties when she came to arrange for the second union. She, evidently, well knew the man she chose to unite her future with, knew generally of his circumstances, and particularly of his family, his age, and prospects in life. Moreover, she had a daughter, twenty-two years of age, who was her constant companion, her confidant and adviser. We do not overlook the finding that she was a woman of little business experience, but, as indicated, the evidence seems to be to the contrary.

The fact is appreciated that the home, which Mr. Bibel-

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hausen so carefully set aside for respondent for life, was disposed of and he moved into another house, owned by him, and lived there to the end. However, it is evident that his purpose was to give respondent the use of the homestead for life and probably such intention persisted to the end. He specially remembered his granddaughter by willing to her the homestead he possessed at the date of the will, subject to the life estate in his wife, and, it is notable, that, while such grandchild was an object of such special regard as to be mentioned in the will next to his wife, and the other grandchild was also generously remembered—showing a purpose to treat both alike—by the *antemortem* sale of the realty described in the will, as the homestead, that feature, as regards being expressly covered, drops out, leaving the granddaughter unremembered and respondent also, as regards the dominant purpose the testator had in mind of bestowing upon his wife a life use of the homestead in which the parties lived at the end. How that is to work out is not before us. We only look to the condition mentioned as bearing on the main facts of the case.

It is observed that counsel claim the trial court pronounced the release void as against public policy, because of the feature designed to preclude the intended wife from having any claim on Mr. Bibelhausen's estate in addition to the stipulated $500, in the event of a separation of the parties after marriage. If such be the case, we are unable to discover it from the court's opinion, nor does it seem to have support, as an original proposition. Counsel point confidently to the text in 9 Cyc. 521, 522, and cases cited. That relates to agreements for separation,—another matter entirely.

Counsel also point to *Baum v. Baum,* 109 Wis. 47, 85 N. W. 122; *Oppenheimer v. Collins,* 115 Wis. 283, 91 N. W. 690; and *Kistler v. Kistler,* 141 Wis. 491, 124 N. W. 1028. Neither has to do with a mere release, for a consideration, of property claims upon the husband's estate in case of a separa-

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tion. The first relates to agreements for a separation. The second to the status, as regards creditors, of a transfer of property to the wife in consideration of her discontinuing an action for divorce and consenting to continue the marital relation, and the last to an agreement for separation and prosecution to effect, of an action for a divorce. Discussion is unnecessary to show that neither in principle nor in the facts does either of those cases throw any light on this one. Whether such an agreement as the one here would be binding on the wife in case of a separation, need not be dealt with. It is sufficient to say that the agreement is not within the principle of the cited authorities. Such an agreement might be an inducement to separate, and might promote continuance of the marriage relations, according to circumstances. In the particular case, the added clause might not have been binding upon the condition happening requisite to its vitality. Such condition did not happen, and the particular feature does not, necessarily, militate against the dominant purpose of the instrument.

We have now considered every question suggested by the briefs of counsel, or which has been raised in our deliberations, and with more than ordinary fulness. The capacity to make such contracts as that in question is very valuable, as an individual right, and it is important to society that this should be understood and vindicated, while being carefully guarded so as to conserve its beneficent possibilities without danger of its being abused. That promotes contracting, continuance of and enjoyment in, the matrimonial relation which sound public policy approves and promotes. To take away that right, or regulate it destructively, or treat its exercise with disfavor, and entry into the marriage state would be efficiently discouraged in many instances, especially in case of each of the parties concerned having been married before, raised a family, and being so advanced in years that companionship and care and comforts of home life are the paramount objects in

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view. In many such cases, capacity to settle in advance, by treaty, property matters would be the turning point. That out of the way, the matrimonial union would have efficient attractiveness, which it is for the best interests of society should exist so far as practicable. The right to so contract is well nigh as important as the right to make a will and is under protection of the same principle that guards all personal rights, subject to regulation for purposes of conservation. The tendency to interfere with these rights, through failure to appreciate the inviolability of them, except where exercise is tainted by fraud or failure to observe the written law as to manner of execution, and to appreciate that fraud is not to be efficiently seen in mere suspicion or unreasonable inference, or without substantial tangible, convincing evidence of it, has had many object lessons in recent years. No matter of the sort should be approached except by the road of legitimate proof, or viewed through the vista of mere imagination and supposition from the particular disposition of property, so long as it is one the disposer had a right to make, and made it understandingly.

By the Court.—The judgment is reversed, and the cause remanded for judgment in favor of defendants as prayed for in the answer.

TIMLIN, J., dissents.

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OLSON, Respondent, vs. WHITE STAR LUMBER COMPANY, Appellant.

December 10, 1914—January 12, 1915.

Sales: Quantity of logs delivered: Instructions to jury: Evidence: Memorandum.

1. In an action to recover the purchase price of logs, the only question being whether the plaintiff's or the defendant's scale of the logs was correct, the court properly instructed the jury to that effect and that if they found the scale of the logs as claimed by the plaintiff to be correct they must find in his favor for the unpaid balance of the purchase price.
2. The admission in evidence in such case of a tabulated statement of the quantity of the different kinds of logs delivered by plaintiff and the amount due therefor at the agreed price, and the use of such memorandum by a witness who testified to the scaling of the logs, that he had made entry thereof in a book, and that the items in the memorandum were accurate, was not prejudicial error, it being clear that the witness had personal knowledge of the transaction referred to and that he testified from such knowledge.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action to recover the purchase price of logs sold to the defendant by the plaintiff.

E. V. Werner, for the appellant.

P. J. Winter, for the respondent.

SIEBECKER, J. The plaintiff claims that he sold and delivered to the defendant a certain amount of birch, hemlock, basswood, and maple logs and that they were scaled by one William Olson and one Liscau; that the amounts due therefor according to such scales were respectively $890.09 and $837.12. The defendant claims that the total amount due for the logs was $680.53 and that all but $4.20 had been paid, and tendered judgment for this balance. The issue thus presented by the pleadings raised the material issue litigated at

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the trial. The evidence of the quantity of logs delivered by the plaintiff to the defendant was in conflict and the court properly submitted the issue to a jury for determination. The circuit court instructed the jury that "the burden of proof rests upon the plaintiff to establish his case by a fair preponderance of the evidence," and directed them that if they found the scale of the logs as claimed by the plaintiff to be correct, then the verdict must be in his favor for the unpaid balance of the purchase price, namely, the sum of $166.64. After having deliberated on their verdict the jury returned into court and inquired of the court whether they could change the amount of the recovery as written in the verdict submitted, and they were instructed that they could not. A verdict was returned for the plaintiff for the amount fixed by the court.

The court denied defendant's motion to set aside the verdict and for a new trial and awarded judgment for the plaintiff in the sum of $166.64.

It is contended that the court erred in its instructions to the jury by directing them that upon the issues raised in the action the evidence presented but the one inquiry, namely, whether the plaintiff's or the defendant's scale of the logs was correct, and if they found that the plaintiff was entitled to recover, then they must award him the sum of $166.64, the amount he claimed. It is plain from the record that the only controverted question between the parties involved the inquiry of the actual quantity of logs the plaintiff had sold and delivered to the defendant. The court properly submitted this to the jury under appropriate instructions. Under the evidence the court also properly informed the jury of the correct amount due plaintiff, if they found that the plaintiff's scale was accurate and true.

The defendant urges an exception to the admission in evidence of a tabulated statement of the quantity of the different kinds of logs delivered by plaintiff and the amount due

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therefor at the agreed price. This tabulation was used as a memorandum by Willie Olson, the witness. He testified to the scaling of the logs, that he had made entry thereof in a book, and that the items in the memorandum were accurate. It is clear that the witness had personal knowledge of the transaction referred to in the memorandum and that he testified from his personal knowledge on the subject. The use of the memorandum under the circumstances was not prejudicial to the defendant. We find no reversible error in the record.

By the Court.—The judgment appealed from is affirmed.

STATE EX REL. BALLARD, Appellant, vs. GOODLAND, Circuit Judge, Respondent.

December 10, 1914—January 12, 1915.

Constitutional law: Officers: Duties: Invalid statute: Removal of town officers by circuit judge: **Quasi-*judicial proceeding: Review:*** Certiorari: *Appeal.*

1. **An unconstitutional law imposes no enforceable legal duty upon a public officer, but the duties of the officer remain defined by existing valid laws and as if such unconstitutional law had never been enacted. Refusal to obey such a law is therefore not ground for the removal of an officer. So *held* as to the "force clause" in ch. 337, Laws of 1911 (sub. 3, sec. 1317*m*—4, Stats. 1911), relating to improvement of highways.**
2. **Where the power to remove officers is conferred upon an administrative tribunal which, either expressly or by fair implication, is empowered to hear evidence and determine the existence of facts which are cause for such removal, the proceeding is *quasi*-judicial and due process of law is required.**
3. **By sec. 976, Stats., the power to remove town officers is conferred upon the circuit judge, not as a court, but as an administrative officer, and such power is to be exercised by *quasi*-judicial action.**
4. **Under sec. 8, art. VII, Const., all tribunals acting in a *quasi*-judicial capacity are subject to the jurisdiction of the circuit court.**

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5. The circuit court may properly issue its writ of *certiorari* to the judge of that court to review his *quasi*-judicial action in removing a town officer, and the judgment of the circuit court thereon may be reviewed in the supreme court on appeal.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Morgan & Benton,* and oral argument by *J. J. Morgan.*

For the respondent there was a brief by *Julius P. Frank,* and oral argument by *A. M. Spencer.*

TIMLIN, J. Proceeding under sec. 976, Stats. 1913, the circuit judge removed the relator from his office as chairman of the board of supervisors of the town of Grand Chute, Outagamie county, because *Mr. Ballard* had refused to levy a tax of $4,800 upon the taxable property of his town pursuant to the provisions of ch. 337, Laws of 1911, otherwise sub. 3 of sec. 1317*m*—4, Stats. 1911. Sec. 976 confers upon the circuit judge as contradistinguished from the circuit court certain administrative and *quasi*-judicial powers, to be exercised either during term time or vacation, for the purpose of removing town officers for cause and upon charges, notice, and hearing. The circuit court issued a writ of *certiorari* to the judge of that court to review the above decision, and from a judgment of the circuit court affirming on *certiorari* the order of the circuit judge this appeal is taken. The proceedings for removal returned pursuant to the writ show that the sole cause for removal was a refusal of *Mr. Ballard* to proceed under sub. 3, *supra.* After the order removing *Mr. Ballard,* the statute which he refused to obey, sub. 3 of sec. 1317*m*—4, otherwise known as ch. 337, Laws of 1911, was by this court declared unconstitutional in *State ex rel. Carey v. Ballard,* 158 Wis. 251, 148 N. W. 1090. The statute was there held invalid because, while leaving the administration of highway affairs and the raising of highway taxes with the town, it at-

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tempted to confer upon private citizens, who would put up a sum of money for the privilege, power to fix the amount and compel the levy of a tax and direct its expenditure. There was therefore no ground shown in the charges or evidence for the removal of *Mr. Ballard.* An unconstitutional law imposes no enforceable legal duty, but the duties of the office remain defined by existing valid laws and as if such unconstitutional law had never been enacted. *Barling v. West,* 29 Wis. 307, 314; *Campbell v. Sherman,* 35 Wis. 103; *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885; *Norton v. Shelby Co.* 118 U. S. 425, 6 Sup. Ct. 1121.

Appellant contends that the removal of an officer is an administrative act. This is too broadly stated. It may be and it may not be, depending upon the kind of office and the kind of the tribunal by which the power is exercised and the statute prescribing the procedure for removal. No one would contend that removal from office by *quo warranto* or by impeachment is an administrative act. Generally speaking, proceedings to remove municipal officers are administrative. The legislature may in the absence of constitutional restriction confer the power of removal of officers upon an administrative tribunal. Express statute may provide for summary removal without charges and without hearing. But the statute may require the *quasi*-judicial action of an administrative tribunal in order to remove, as where the statute expressly or by fair implication confers upon such tribunal the power and duty to hear evidence and determine the existence of facts which are cause for such removal. In the latter case the requirement of due process of law obtains. *Ekern v. McGovern,* 154 Wis. 157, 142 N. W. 595; *Schiltz v. Roenitz,* 86 Wis. 31, 56 N. W. 194; McGehee, Due Process of Law, 28–30, 162, 164. The removal provided for in sec. 976, Stats. 1913, is of the latter class. Administrative powers are conferred upon the circuit judge, not as a court, but as an administrative officer, such powers to be exercised by him by *quasi*-judicial action. All

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tribunals so acting in a *quasi*-judicial capacity are subject to the jurisdiction of the circuit court. Sec. 8, art. VII, Const. It was therefore proper procedure for the circuit court to issue its writ of *certiorari* to the judge of that court to review the *quasi*-judicial action of the latter. The question presented is therefore properly before this court, and, the removal of *Mr. Ballard* having been without legal or justifiable cause, the judgment of the circuit court affirming the order of the judge is reversed, and the cause remanded with directions to the circuit court to reverse such order of the judge and dismiss the proceedings, with costs against the petitioner for removal.

By the Court.—It is so ordered.

STATE EX REL. WICKHAM, Appellant, vs. NYGAARD, County Clerk, Respondent.

December 11, 1914—January 12, 1915.

Courts: Judges: Disqualification by interest: Constitutional law: Income tax: Salaries of public officers: Circuit judge: Appeal from board of review: County assessor.

1. A collateral or indirect interest in a controversy will not disqualify a judge from hearing and determining the same, where there is no other judicial officer or body before whom the case can be taken for decision.
2. The provision of sec. 9, art. I, Const., that every person is entitled to a certain remedy in the law for all injuries, etc., is above and superior to any inconsistent common-law rule that existed when the constitution was framed, as well as any statute enacted since that time.
3. *Jefferson Co. v. Milwaukee Co.* 20 Wis. 139, doubted.
4. The amendment to sec. 1, art. VIII, Const., providing that "taxes may be imposed on incomes," authorized the legislature to tax incomes in any case where the power rests in the state to impose such a tax, and hence includes power to tax the salaries of public officers.
5. The provision of sec. 1087*m*—2, Stats. 1913, exempting salaries

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"where the taxation thereof would be repugnant to the constitution," did not show an intention on the part of the legislature to exempt salaries of public officers, provided they were constitutionally taxable.

6. *It seems* that the salaries of federal office holders residing in this state are not subject to taxation by the state.

7. A circuit judge is a state officer, and as such his salary is subject to taxation under the state income tax law. The imposition of such tax after his term of office has commenced does not violate sec. 26, art. IV, Const., providing that the compensation of any public officer shall not be increased or diminished during his term of office, because that section must be read in connection with the amendment to sec. 1, art. VIII.

8. A county income tax assessor, if dissatisfied with the decision of the board of review of income assessments, has the right, under sec. 1087*m*—19, Stats., to appeal therefrom to the state tax commission.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

For the appellant there were briefs by *James Wickham, in pro. per.,* and oral argument by *W. P. Crawford.*

The *Attorney General,* for the respondent.

BARNES, J. This is a *certiorari* proceeding brought by the relator to set aside an income tax assessment levied by the taxing officers in the year 1913 on the salary received by the relator as circuit judge for the year 1912. The assessor of incomes assessed the relator's salary. The latter appeared before the board of review and objected to such assessment. The objection was sustained by the board, and the income tax assessor appealed to the state tax commission from such decision. The commission, without hearing or notice, reversed the decision of the board of review and ordered that said income be taxed. Thereupon the county clerk certified to the city clerk for collection a tax computed on the relator's salary. The proceeding was tried in the superior court of Douglas county, and judgment went against the relator, from which judgment he appeals to this court.

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The relator makes two contentions: (1) His salary as a state officer was not subject to taxation, and (2) Teall, the income tax assessor, had no power to appeal from the decision of the board of review, and the tax commission had no jurisdiction to act on the unauthorized appeal.

A question which is not raised, but which is obviously involved, will be first disposed of, and that is the competency of this court to hear and decide the pending controversy. The attorney for Judge WICKHAM stated on the oral argument that he was instructed by his client to waive any objection as to the qualification of the members of the court to decide the case and to consent that it might be passed upon. The attorney general expressed neither assent nor dissent, further than consent might be implied from silence and from filing a brief and participating in the oral argument without objection. The members of this court are not directly interested in this lawsuit, but it is none the less true that the settlement of the main question of law involved will affect the majority of the court. If it is settled that Judge WICKHAM's salary is exempt from assessment for income tax, then the salary of every other public officer is exempt during his term, where such term began before the passage of the Income Tax Law. The question is: Does the fact that the members of the court, or a majority of them, may or will be affected in a financial way by the decision which the court is called upon to make disqualify them from acting? It is a question which not infrequently arises, although seldom in so pronounced a way as in the present instance. Cases often come before the court which affect the taxpayers of the city of Madison and of Dane county. A majority of the members of the court pay taxes in the city of Madison and are affected like other taxpayers by such litigation. The state has had many cases affecting the interests of all the taxpayers in it, including, of course, the members of the court. It is probable that a majority of the court carry life insurance in one or more mutual insurance companies and have some remote interest as policy-

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holders in the result of litigation affecting such companies. Other instances might be referred to which present a situation not unlike the one which presently confronts us.

Sec. 2579, Stats., provides: "In case any judge of any court of record shall be interested in any action or proceeding in such court . . . such judge shall not have power to hear and determine such action or proceeding or to make any order therein, except with the consent of the parties thereto."

It has been held under this section that the interest which disqualifies must be a pecuniary one. *Hungerford v. Cushing,* 2 Wis. 397.

In *Jefferson Co. v. Milwaukee Co.* 20 Wis. 139, a motion for a change of venue was made on the ground that the circuit judge was interested as a taxpayer in the controversy. The application was denied and such ruling was held to be erroneous. It was said that the interest of the circuit judge was so trifling that in the absence of an objection being made to his sitting he would be held qualified. It was also said that had he been called upon to act from necessity and to prevent a failure of the administration of justice, he would have been competent notwithstanding the objection. To the same effect on this latter point is *State ex rel. Cook v. Houser,* 122 Wis. 534, 607, 100 N. W. 964.

The soundness of the decision in *Jefferson Co. v. Milwaukee Co., supra,* is subject to grave doubt. The statute was designed to reach substance, not shadows. The bare fact was made to appear that the judge was a taxpayer. The amount of the claim was $652.41. A distribution of this sum among the taxpayers of Milwaukee county might increase the judge's taxes from one to five cents—hardly any more. Such an unsubstantial interest should hardly have been held to be a disqualification. We do not wish to be understood as approving the decision in this opinion.

The point under discussion is exhaustively treated in *Matter of Ryers,* 72 N. Y. 1, where many of the leading cases on the subject are cited and discussed, and the conclusion is

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reached that a collateral or indirect interest in the controversy does not disqualify where there is no other judicial officer or body before whom the case can be taken for decision.

There is an additional and very cogent reason in this case why the court should decide the controversy. Sec. 9 of art. I, Const., reads as follows:

"Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

Now it is self-evident that if an unlawful tax has been assessed against the petitioner, he has suffered a wrong and that some of his property will be taken by means of unjust taxation. If he cannot go into any court to assert his right, he is absolutely deprived of the remedy which our organic law gives him. That law is above and beyond any inconsistent common-law rule that existed when the constitution was framed, as well as any statute enacted since that time.

We do not lay down any hard-and-fast rule as to what interest disqualifies a judge from hearing a cause, but content ourselves with saying that we conclude that it is our plain duty to hear and decide the case before us so that there may be no denial of justice. Any public officer has the right to raise the question that is here raised and to have it decided, no matter how distasteful it may be to judges to sit in a case where they may be affected by the result of the decision reached. We now pass to the questions argued in the briefs and at the bar.

1. Sec. 26 of art. IV of the state constitution contains this provision: "nor shall the compensation of any public officer be increased or diminished during his term of office."

The Income Tax Law, paragraph "c" of sec. 1087*m*—2, provides:

"All wages, salaries or fees derived from services; provided that compensation to public officers for public service shall

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not be computed as part of the taxable income in such cases where the taxation thereof would be repugnant to the constitution."

It is conceded that the tax was levied during the relator's term of office and it is beyond question that he was a public officer. *Milwaukee Co. v. Hackett,* 21 Wis. 613; *State ex rel. Martin v. Kalb,* 50 Wis. 178, 6 N. W. 557.

Briefly stated, the position of the relator in reference to the above quoted constitutional provision is this: If the state gives a salary with one hand and takes part of it away with the other, it diminishes the salary to the extent of the part taken, no matter under what pretense it is taken. The state may if it sees fit collect its entire revenue from a tax on incomes, and thus take away a large portion of the salary which it pays its officers. The power to tax involves the power to destroy (*McCulloch v. Maryland,* 4 Wheat. 316, 441), and if a state may evade the constitutional provision referred to by using the taxing power, the safeguard provided has little force or vitality. The following authorities are cited as being directly in point: Opinion of TANEY, C. J., on National Income Tax (U. S.) 39 L. ed. 1155; *Taxation of Salaries,* 131 N. C. 692, 42 S. E. 970; *Comm. v. Mann,* 5 W. & S. 403; *New Orleans v. Lea,* 14 La. Ann. 197; 23 Cyc. 531, 532, note 31; 13 Op. Att'y Gen. U. S. 161; Op. Att'y Gen. Wis. 1912, 972.

Other cases cited as establishing the principle contended for are *Dobbins v. Erie Co.* 16 Pet. 435; *Collector v. Day,* 11 Wall. 113; *Pollock v. Farmers' L. & T. Co.* 157 U. S. 429, 584, 15 Sup. Ct. 673; *Whitney v. Gunderson,* 31 Wis. 359; *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 51, 8 N. W. 833; *U. S. v. Thurston Co.* 143 Fed. 287; *Jones v. Estate of Keep,* 19 Wis. 369, 374; *State v. Railway Cos.* 128 Wis. 449, 519, 108 N. W. 594.

If the salary clause of the constitution were the only one which affected the situation, an interesting question would be

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presented upon which no great amount of authority can be found. What little there is seems to support the relator's contention. The constitution provided originally that taxes should be levied on property, and the matter of taxing incomes was something that was practiced little, if at all, in America when the constitution was adopted. That the framers of our constitution intended to exempt public officers from any part of the burden of taxation which might be imposed generally on the body of the taxpayers of the state for the support of the government and the benefit of the public, including the office holders, may well be doubted. It is not necessary to decide the point in this case.

Sec. 1 of art. VIII of our constitution originally provided: "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." To this was added by way of amendment, the following proviso in 1908: "Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

The attorney general argues that the uniformity clause of the original section extends to the amendment, and that if the act of the legislature attempted to exempt salaries it would be unconstitutional. The relator argues that the uniformity clause has no application to the assessment of incomes. The question is not important here, because we construe the amendment as authorizing the legislature to tax incomes in any case where the power rests in the state to impose such a tax. It would not be contended that the constitution might not be amended so as to abrogate sec. 26 of art. IV entirely. Neither would it be contended, if the amendment of 1908 had in express terms stated that salaries of public officers should be subject to an income tax, that so much of sec. 26 of art. IV as prohibited the levy of such a tax would not be abrogated, assuming that it did prohibit the imposition of a tax on salaries of public officers. The real question is one of construc-

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tion involving the comprehensiveness of the 1908 amendment. The language is broad and sweeping, making and containing no exception. Both constitutional provisions are somewhat general in their nature. As applied to the right to tax incomes of state officers, sec. 26 of art. IV is no more specific than is the amendment of 1908. Hardly as much so. The latter says taxes may be "imposed on incomes." We are not at liberty to rewrite this clause so as to read that taxes may be "imposed on incomes, except where the income consists of a salary received by a public officer." We perceive very little room for construction, and if a doubtful question were involved it should not be resolved against the exercise of the taxing power by the state.

It is argued that there was no intention on the part of the legislature to tax the salaries of public officers as part of their income, because sec. 1087*m*—2, Stats., provided that such income should not be taxed if such taxation would be repugnant to the constitution. It seems to us that it was clearly the intention to tax all salaries that could be constitutionally taxed. The section in question was held to be valid legislation in the *Income Tax Cases,* 148 Wis. 456, 515, 134 N. W. 673, 135 N. W. 164. The restriction was entirely proper. The legislature desired to reach the salaries of public officers if it could do so, but did not want to imperil the entire act if it could not do so. The words "all wages, salaries or fees derived from services" might well be held to cover the compensation received by federal office holders who are residents and citizens of the state. Yet, under the decisions of the United States supreme court, it would appear that such salaries are not subject to a state tax. *Dobbins v. Erie Co.* 16 Pet. 435; *Pollock v. Farmers' L. & T. Co.* 157 U. S. 429, 584, 15 Sup. Ct. 673. We do not see how the provision referred to affects the situation one way or the other in determining the constitutional question involved or the taxability of the income, if the legislature had the power to impose a tax on it.

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2. The relator further urges that the income tax assessor had no power to appeal from the decision of the board of review to the tax commission. It is said that a person cannot take an appeal unless he is a party or privy to the proceeding and have a substantial interest in the controversy and be prejudiced by the decision appealed from, and that all of these prerequisites are lacking in the instant case. Many decisions are cited to support the contention made, which is no doubt correct enough as applied to court proceedings. This proceeding is statutory, however, and the statute is pretty comprehensive. Sec. 1087*m*—19 provides: "*Any person dissatisfied with any determination* of the county board of review may appeal within twenty days," etc. It may be fairly said that taxpayers generally are interested in seeing that no property escapes taxation. A full disclosure tends to equalize the burden of taxation, and, theoretically at least, to lessen it as to those who comply with the law. An income tax assessor is charged with very important duties in reference to the administration of the Income Tax Law. He assessed this income in the first instance. He was a person dissatisfied with the action of the board of review, and it seems clear that the statute conferred on him the right to appeal.

By the Court.—Judgment affirmed.

BICHLMEIR, Appellant, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Respondent.

December 11, 1914—January 12, 1915.

Commerce: Interstate shipments: Action for damage, against whom brought: Jurisdiction of state courts.

Since the enactment of the Carmack amendment (34 U. S. Stats. at Large, 595, ch. 3591), as well as before, an action for damage to goods in an interstate shipment may be maintained against a carrier who negligently caused such damage but who was not the initial carrier; and the state courts have jurisdiction of such actions.

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APPEAL from a judgment of the circuit court for Barron county: GEORGE THOMPSON, Judge. *Reversed.*

On or about October 1, 1912, plaintiff delivered a certain amount of apples to the Missouri Pacific Railway Company at Willis, Kansas, for shipment to Almena, Wisconsin, a station on defendant's line. When the apples arrived there was a shortage in weight of nearly one fifth, due, it is alleged, to the negligence of the defendant, and damages for such shortage are demanded. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and from a judgment dismissing the action the plaintiff appealed.

The cause was submitted for the appellant on the brief of *J. W. Soderberg,* and for the respondent on that of *C. C. and A. E. Coe.*

VINJE, J. The complaint specifically alleges that the loss in transit occurred while the apples were in the custody of the defendant and by reason of its negligence. The defendant was the last carrier and the Missouri Pacific Railway Company the initial carrier, and the shipment was an interstate one. Two questions arise upon the demurrer. (1) Since the enactment of the Carmack amendment (34 U. S. Stats. at Large, 595, ch. 3591), may an action for damage to goods in an interstate shipment be maintained against a carrier who negligently causes such damage but who is not the initial carrier? and (2) Does a state court have jurisdiction of such an action?

1. The Carmack amendment provides:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation

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company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

This amendment clearly gives a right of action against the initial carrier. But is such remedy exclusive? The proviso that nothing in this section should deprive the holder of the receipt or bill of lading of any remedy or right of action which he has under existing law was construed in *Adams Exp. Co. v. Croninger,* 226 U. S. 491, 33 Sup. Ct. 148, to mean existing federal law and not state law. So the remedy given by the amendment was additional to and concurrent with any other existing federal remedy. The question, therefore, arises whether under federal law prior to the enactment of the Carmack amendment a shipper had a right of action against a carrier negligently causing the damage but who was not the carrier with whom the initial contract of shipment was made. An affirmative answer to this question was given by the supreme court of the United States in the case of *New Jersey S. N. Co. v. Merchants' Bank,* 6 How. 344, 12 L. ed. 465, and so far as we have been able to discover the rule there announced has remained unchanged. Such are also the uniform holdings of state courts. See 1 Hutchinson, Carr. (3d ed.) sec. 236 and cases cited; 4 Ruling Case Law, § 404 and cases cited. The reason of the rule that the owner of the goods may proceed directly against the carrier who is the actual wrongdoer, even if he has a remedy against the receiving carrier, is that each carrier is an agent of the owner authorized to contract with the connecting carrier for the safe transportation of the shipment, which, when undertaken by such carrier, becomes a contract with the owner, for a breach of which he can proceed directly against the carrier in default. Owing to the important public duties which a common carrier per-

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forms, the law implies a sufficient privity of contract between the shipper and the connecting carrier to enable the shipper to maintain an action against such carrier for a breach of the contract of shipment entered into by the initial carrier. The English courts, however, repudiate the idea of privity of contract and restrict the remedy to the receiving carrier. 4 Ruling Case Law, § 404.

2. Sec. 9 of the original Interstate Commerce Act (24 U. S. Stats. at Large, 379, ch. 104), limiting jurisdiction to federal courts, relates to actions in which it is claimed the carrier has violated the act by doing something which it forbids or has neglected to do something which it commands should be done. It does not have reference to actions brought under the Carmack amendment enforcing liability of the initial carriers for damages caused by negligent carriage, or to actions for such damages not brought under the Carmack amendment. Of such actions state courts have jurisdiction. *Smeltzer v. St. L. & S. F. R. Co.* 168 Fed. 420; *Ft. Smith & W. R. Co. v. Awbrey & Semple,* 39 Okla. 270, 134 Pac. 1117. In *Kansas City S. R. Co. v. Carl,* 227 U. S. 639, 33 Sup. Ct. 391, 57 L. ed. 683; and in *Chicago, B. & Q. R. Co. v. Miller,* 226 U. S. 513, 33 Sup. Ct. 155, 57 L. ed. 323, the supreme court of the United States decided writs of error to state courts in actions brought under the Carmack amendment without intimating that state courts had no jurisdiction. State courts have jurisdiction to enforce federal laws unless it is withheld directly or by necessary implication.

The case of *Siggins v. C. & N. W. R. Co.* 153 Wis. 122, 140 N. W. 1128, was an action to recover a freight overcharge on an interstate shipment. A violation of the Interstate Commerce Act was therefore involved, and by force of sec. 9 of the act the action could be brought only in a federal court.

This is not such an action. It is one to enforce a common-law liability of a common carrier for which the Carmack amendment gives a remedy concurrent with federal remedies

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theretofore existing, and of which state courts have jurisdiction. It follows that the demurrer should have been overruled and that the judgment dismissing the action was erroneous.

By the Court.—Judgment reversed, and cause remanded with directions to overrule the demurrer and for further proceedings according to law.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant, vs. DOUGLAS COUNTY and another, Respondents.

December 11, 1914—January 12, 1915.

Railroads: Taxation: Terminal facilities: Ore and merchandise docks: Property "necessarily" used is an entirety: Constitutional law: Uniformity in rule of taxation: Statute construed.

1. **The property of a public-service corporation like a railway company, including its franchises, terminals, and real and personal property, reasonably necessary to be used and in fact used in the performance of its duties to the public, is an entirety and is not to be separated for the purpose of taxation.**
2. **Terminal facilities, such as freight houses, grain elevators, and warehouses, owned by the carrier and equipped with the proper appliances necessary to enable it to perform its full duty of transportation and delivery of freight of all kinds, either to the consumer, the dealer, or a connecting carrier, constitute property "necessarily used in operating the railroad," within the meaning of sub. 3, sec. 1212, Stats. 1911, and are part of the entirety. The word "necessary," in this connection, means reasonably required in the exercise of sound business prudence.**
3. **An ore dock and a merchandise dock owned and operated by a railway company exclusively for its own use in temporarily storing, handling, and delivering to lake carriers the ore and freight hauled by it over its lines, and in receiving from lake carriers, temporarily storing, and loading merchandise and freight destined for transportation over its railway lines, are necessarily used in operating the railroad and are terminal facilities, within the foregoing rule.**

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4. The constitutional command that the rule of taxation shall be uniform (Const. art. VIII, sec. 1) is violated if a part of the property of a railway company, reasonably necessary to be used and in fact used in the operation of the railroad, be separated from the balance of the property and subjected to local taxation at a higher rate than that to which the balance of the property is subjected under the *ad valorem* law.
5. The exception in sub. 3 of sec. 1212, Stats. 1911, viz. "grain elevators used in transferring grain between cars and vessels, coal docks, ore docks and merchandise docks," includes only those elevators and docks which are not a part of the railway property because not necessarily used by the railroad in the performance of its duties as a common carrier.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Reversed.*

Action in equity to set aside taxes levied by the city of Superior in 1912 upon the ore and merchandise docks and the lands on which they are located, owned and operated by the appellant in that city.

The facts in brief are these: The appellant company owns and operates between three and four thousand miles of railroad, extending from Superior to the grain fields of Minnesota and the Dakotas, as well as the iron ranges of Minnesota and the mining regions of Northeastern Wisconsin and Michigan. In August, 1910, it obtained from the Wisconsin railroad commission a certificate of convenience and necessity, authorizing it to build its ore railroad, commencing at its then main track and extending northerly through the city of Superior to the harbor line on the southerly side of St. Louis Bay. It built this ore railroad, including the elevated structure known as the approach to the dock, and the dock itself extending into the St. Louis Bay or river to the government dock line, and this dock is the dock mentioned in the complaint, and situated upon the lands there described. The dock is 1,800 feet in length, about eighty feet in height, and has 300 pockets which hold approximately 300 tons each. The railroad tracks are laid on top and the full length of the

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dock, and it has always been owned and operated by the appellant exclusively for its own use in temporary storing and delivering of ore by it to boats, which in turn carried the ore to Eastern markets. At the time the appellant built this dock there were no other facilities at Superior which it could use for the purpose of storing, handling, or loading into lake carriers the ore which it transported. When the appellant built its railroad into Superior there were two merchandise docks there, one operated by the Great Northern Railway Company, which was insufficient in capacity to handle the business of that company, and the other operated by the Omaha Railway Company, located on Allouez Bay, several miles from any point on the appellant's road. Private capital has never furnished any docks or other terminal facilities at Superior for the transfer from rail to lake or lake to rail of either ore or merchandise. The appellant constructed a merchandise dock at Superior at the north end of Connor's Point, near the Interstate bridge, it being 1,000 feet long, eighty feet wide, with a water slip on one side, and four railroad tracks, for the service of the dock, immediately adjoining the other side, and it continued to own and operate this merchandise dock and tracks laid thereto for the purpose of temporary storage of freight hauled by it over its railroad, and loaded from the dock to vessels on the water side, and in receiving from the vessels freight coming in by water and destined to points upon the appellant's railroad.

No other use is made of the appellant's ore and merchandise docks except to receive ore and freight coming into Superior over appellant's lines and temporarily store and deliver the same to lake carriers, and to receive from lake carriers merchandise and freight destined for transportation over the appellant's railway lines, and temporarily store and load the same on cars for such transportation. The ore dock is elevated about eighty feet above the water and is furnished

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with large pockets, the ore being dumped into the pockets, where it remains until a lake carrier is ready to receive it, when it is loaded into the carrier by gravity.

By ch. 540 of the Laws of 1911, sub. 3 of sec. 1212, Stats. (now sub. (7) of sec. 51.02, ch. 51, Stats. 1913), being the *ad valorem* railway taxation act, was amended so as to read as follows:

"3. The term 'property of the railroad company,' as used in this act, shall include all franchises, right of way, roadbed, tracks, stations, terminals, rolling stock, equipment and all other real and personal property of such company, used or employed in the operation of the railroad or in conducting its business, and shall include all title and interest in such property as owner, lessee or otherwise. Real estate not adjoining its tracks, stations or terminals; grain elevators used in transferring grain between cars and vessels, coal docks, ore docks and merchandise docks and real estate not necessarily used in operating the railroad are excepted, and shall be subject to taxation like the property of individuals."

Claiming to act under this section, the city officers of the city of Superior listed the appellant's said ore dock and merchandise dock, including the lands on which they stand, for taxation, placed the same upon the assessment roll, and levied taxes thereon like other real estate in the city in the year 1912. The taxes not being paid, the lands were returned as delinquent and will be sold at tax sale unless such sale be restrained. The rate of taxation applied to the plaintiff's railroad by the tax commission for the year 1912 under the *ad valorem* railway taxation act was .01108 plus, the rate of taxation on property in the city of Superior for that year was .02678, and the said docks were taxed at that rate.

The circuit court concluded that the docks were essentially wharf property, and might be assessed and taxed separately from the railroad itself, and dismissed the complaint. From this judgment the plaintiff appeals.

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For the appellant there was a brief by *Luse, Powell & Luse,* attorneys, and *A. H. Bright* and *J. A. Murphy,* of counsel, and oral argument by *Mr. L. K. Luse* and *Mr. Murphy.*

Arch'd McKay and *H. V. Gard,* for the respondents.

There was also a brief and oral argument by *C. H. Van Alstine, amicus curiæ.*

WINSLOW, C. J. The question in this case is whether the ore and merchandise docks can be separated from the balance of the plaintiff's property for purposes of taxation and subjected to a different tax rate. The answer to this question must unquestionably be in the negative, and the propositions on which that answer is based are simple.

1. The property of a public-service corporation, like a railway, including its franchises, terminals, and real and personal property, reasonably necessary to be used and in fact used in the performance of its duties to the public, is an entirety and is not to be separated for the purpose of taxation. *State ex rel. Milwaukee St. R. Co. v. Anderson,* 90 Wis. 550, 63 N. W. 746; *Washburn v. Washburn W. W. Co.* 120 Wis. 575, 98 N. W. 539; *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 619, 108 N. W. 557.

2. Terminal facilities, such as freight houses, grain elevators, and warehouses, owned by the carrier, equipped with the proper appliances necessary to enable the railroad to perform its full duty of transportation and delivery of freight of all kinds, either to the consumer, the dealer, or a connecting carrier, constitute property necessarily used in the operation of a railroad, and hence become part of the entirety. The word "necessary" here does not mean "inevitable" on the one hand, nor merely "convenient" or "profitable" on the other, but a stage of utility or materiality to the carrier's business less than the first but greater than the latter of these expressions. Perhaps the phrase "reasonably required in the exercise of sound business prudence" would express the idea fairly well.

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Chicago, St. P., M. & O. R. Co. v. Douglas Co. 122 Wis. 273, 99 N. W. 1030; *Chicago, St. P., M. & O. R. Co. v. Bayfield Co.* 87 Wis. 188, 58 N. W. 245; *Superior Board of Trade v. G. N. R. Co.* 1 Wis. R. R. Comm. Rep. 619.

3. Both the ore dock and the merchandise dock in the present case come within the definition given in the last paragraph and are an integral part of the appellant's railway system. The fact that a considerable part of the ore-dock structure was made necessary in order to facilitate the transfer of the ore to lake carriers does not logically divest it of its character as a railway terminal. Necessarily it is a terminal facility of a specialized character, but just as truly a terminal facility.

4. The constitutional command that the rule of taxation shall be uniform is violated if a part of the property of a railroad company reasonably necessary to be used and in fact used in the operation of the railroad, like the docks in the present case, be separated from the balance of the property and subjected to local taxation at a higher rate than that to which the balance of the property is subjected under the *ad valorem* law. *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557.

5. The exception in sub. 3, sec. 1212, Stats. 1911 (now sub. (7) of sec. 51.02, ch. 51, Stats. 1913), viz. "grain elevators used in transferring grain between cars and vessels, coal docks, ore docks and merchandise docks," must be held to include only those elevators and docks which are not a part of the railway property, because not necessarily used by the railroad in the performance of its duties as a common carrier, as are the docks in question in the present case.

By the Court.—Judgment reversed, and action remanded with directions to render judgment for the plaintiff in accordance with the prayer of the complaint.

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GRABER, Respondent, vs. DULUTH, SOUTH SHORE & ATLANTIC RAILWAY COMPANY, Appellant.

December 11, 1914—January 12, 1915.

Railroads: Injury to brakeman: Interstate service: When federal statute governs: Election: Waiver: Questions for jury: Assumption of risk: Excessive damages: Appeal: Harmless errors: Discretionary reversal.

1. Where the facts are undisputed the question whether a particular service or engagement therein is of interstate character is one of law; but when material facts bearing on that question are in dispute they may properly be determined by the jury, leaving to the court the legal conclusion to be drawn therefrom.
2. A railway employee, while actually performing a service essential to or so closely connected with the business of interstate commerce as to be substantially a part of it, though not necessarily exclusive of all *intrastate* features, is employed in interstate commerce within the meaning of the federal Employers' Liability Act.
3. If the particular service in progress at the time of the injury, in any substantial part, is within the interstate field, then the federal law rules the case if either party so elects; but this is a right which may be waived, expressly or impliedly.
4. Any brief incidental absence from the scene of work or the instrumentality used therein, which is not inconsistent with the employee's duty to his employer, such as customarily visiting a wayside place for lunch or other common means of refreshment, or waiting after one task is done for orders as to the next movement, does not preclude the employee from claiming to be still on duty and engaged in interstate commerce.
5. Where upon the evidence the trial court might properly have found, as matter of law, that plaintiff was engaged in interstate business when injured, its submission of the question to the jury is not an error of which defendant can complain.
6. Where, in an action for injuries to a railway employee, neither party claimed the benefit of the federal Employers' Liability Act, there was no error in refusing to compel plaintiff to elect whether he would claim under the federal or the state law; and where the court applied the federal law, which was more beneficial to the defendant than the state law, the defendant has no ground for complaint.
7. The defense of assumption of risk, available under the federal Employers' Liability Act, applies only to such risks as the em-

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ployee expressly or impliedly contracts to take upon himself because of being ordinary incidents of the business as customarily carried on, or as carried on in the particular case to his knowledge or under such circumstances that reasonable attention to his situation would afford him such knowledge. It does not include the risk of unexpected negligent acts of co-employees.

8. An award of $10,000 for injuries to a brakeman's foot, necessitating amputation of the leg between the ankle and the knee, is *held* not so large that this court should reverse the judgment, under sec. 2405*m*, Stats. 1913, on the ground that justice had miscarried, where, although the proper motion was made in the trial court, the question was not argued upon the appeal.

APPEAL from a judgment of the circuit court for Douglas county: W. J. TURNER, Judge. *Affirmed.*

Action to recover for a personal injury.

Defendant was engaged in interstate and intrastate commerce of railroad transportation character. Plaintiff was in its employ, his business, in the main, being that of a brakeman between Soo Junction and Marquette in the state of Michigan. Soo Junction was a terminal transfer point where cars were brought from within and without the state and placed in or made up into trains for completion of transit. That service was essential to the interstate as well as the intrastate feature of defendant's business. February 24, 1912, in the early part of the evening, plaintiff with his train crew completed the trip for the day from Soo Junction to Marquette and return. On such return, several interstate cars were brought in. The remaining duty for the day was to sidetrack the cars, put away the engine in the roundhouse, locate and properly close the caboose, and do work in the yard, if time should permit, and such were the orders from the conductor. After his train work was done, pursuant to duty, he set the brakes on some cars on the sidetrack so they would not be unduly disturbed by the movement of the through train which was about to exercise the necessary movements to take in some cars and prepare to proceed upon its course. It was an interstate train. After doing such work, plaintiff pro-

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ceeded to a near-by saloon, off the right of way, to get a drink. The saloon was so located that the through train, for a considerable distance up and down the track, obstructed the way therefrom to the depot. It was a cold day and plaintiff had been out so long that he felt in need of refreshments. When he had last seen his conductor, of whom it was his duty to inquire as to further orders before going to supper, he was at the depot. After getting the drink plaintiff started for the depot, for the purpose of obtaining final instruction and then going to supper at a place on the right of way, on the depot side of the standing train. Such train had completed the required switching, taken in several cars, and the engine was about to be spotted at the water tank to take in a supply of water and be in readiness to depart. As plaintiff reached the train and was in the act of climbing through between two gondola cars, without any signal being given, it was suddenly started, whereby his right foot was caught and so crushed that amputation of the leg between the ankle and knee, was necessary.

Upon proof of the foregoing, the particulars of the occurrence, the nature of the injury, its effect, evidence tending to prove that trains often stood as in the particular case, and as often as half an hour to an hour and a half, leaving no way of getting from the side of the track where plaintiff was before endeavoring to pass through between the cars, other than by executing some such movement as he attempted or go around the end of the train, and that trainmen commonly took the short cut and depended for warning of danger upon a signal by ringing of the engine bell which commonly occurred before moving a train,—the cause was submitted to the jury, resulting in a verdict of $10,000 for plaintiff upon which judgment was rendered.

For the appellant there was a brief by *Thomas S. Wood* and *Wm. R. Foley,* and oral argument by *Mr. Wood.* They contended, *inter alia,* that plaintiff was not engaged in interstate commerce nor within the scope of his employment.

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Ill. Cent. R. Co. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646; *Pedersen v. D., L. & W. R. Co.* 229 U. S. 146, 33 Sup. Ct. 648; *Ellsworth v. Metheney,* 104 Fed. 119, 51 L. R. A. 389; *Southern R. Co. v. Bentley,* 1 Ala. App. 359, 56 South. 249; *Brown v. Shirley Hill C. Co.* 47 Ind. App. 354, 94 N. E. 574; *Pioneer M. & M. Co. v. Talley,* 152 Ala. 162, 43 South. 800, 12 L. R. A. N. S. 861; *Shadoan's Adm'r v. C., N. O. & T. P. R. Co.* 26 Ky. L. Rep. 828, 82 S. W. 567; *Howard v. Southern R. Co.* 132 N. C. 709, 44 S. E. 401; *Pittsburg & C. R. Co. v. Sentmeyer,* 92 Pa. St. 276, 37 Am. Rep. 684; *Kennedy v. Chase,* 119 Cal. 637, 52 Pac. 33; *Chicago & A. S. & R. Co. v. Collins,* 43 Ill. App. 478; *Wright v. Rawson,* 52 Iowa, 329, 3 N. W. 106; *Severy v. Nickerson,* 120 Mass. 306; *Hills v. Blair* (Mich.) 148 N. W. 243; *Benson v. L. & N. R. Co.* [1904] 1 K. B. 242.

For the respondent there was a brief by *John C. Kleczka* and *Glicksman, Gold & Corrigan,* attorneys, and *W. P. Crawford,* of counsel, and oral argument by *Mr. Crawford* and *Mr. W. L. Gold.*

MARSHALL, J. Appellant's complaint is of submission of the case to the jury on the question of whether respondent, at the time he was injured, was engaged in interstate commerce, and within the scope of the federal Employers' Liability Act.

Whether a particular service or engagement therein is of interstate commerce character, is a question of law. The facts being undisputed, jury interference is unnecessary, and, if objected to, is improper, though not, necessarily, prejudicially so. Where the facts are so in dispute as to justify, from one viewpoint, a finding in respect thereto on any vital element one way, and from a different aspect in a different way, the truth of the matter is for jury solution under proper instructions, and the legal conclusion is for the court to determine, based thereon. *North Carolina R. Co. v. Zachary,* 232 U. S. 248, 34 Sup. Ct. 305.

Commerce between a point in one state and a point in an-

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other, is interstate commerce. Those engaged in carrying on such commerce, either as principal or employee, are engaged in interstate commerce, and one while actually performing a service essential to or so closely connected with such business as to be substantially a part of it,—an act in the carrier service of the interstate work,—though not necessarily exclusive of all intrastate features, is in the performance of interstate service in the carrying on of interstate commerce, within the meaning of the federal Employers' Liability Act. Such is its scope, as the federal supreme court has held in this language:

"Every common carrier railroad while engaged in commerce between the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce." *Pedersen v. D., L. & W. R. Co.* 229 U. S. 146, 33 Sup. Ct. 648; *North Carolina R. Co. v. Zachary, supra; Ill. Cent. R. Co. v. Behrens,* 233 U. S. 473, 34 Sup. Ct. 646.

Thus it will be seen, that the test of whether the federal act applies to any particular situation is not whether the particular person directly causing the injury was, at the time thereof, engaged in interstate business, nor whether the act in which the person was engaged was, exclusively, an interstate commerce service; but whether the person or corporation charged with liability was engaged at the time it occurred in such commerce and the particular service in progress and environing or characterizing the employer's activity at the time of the injury, was of that nature,—its cast in that regard being efficient if the work was a substantial part of interstate commerce. Where the particular work is entirely independent of interstate commerce service, the federal act does not apply, as in case of the switching movement of intrastate cars solely for intrastate purposes, *Ill. Cent. R. Co. v. Behrens, supra,*—an act the performance of which is a matter of indifference, so far as interstate commerce is concerned. *Ped-*

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ersen v. D., L. & W. R. Co., supra. But, as indicated, if the particular act, in any substantial part, is within the interstate field, then the federal law rules the situation, if either party sees fit to stand upon legal right in the matter. That may be done, or waived, expressly or impliedly. *Leora v. M., St. P. & S. S. M. R. Co.* 156 Wis. 386, 146 N. W. 520; *Hanson v. C., M. & St. P. R. Co.* 157 Wis. 455, 146 N. W. 524.

In the cases cited, the federal supreme court explained that the law does not permit of splitting up a service, which is in its nature an entirety, into its various steps or elements. Work in the repair of a bridge, as was said, which is used in intrastate as well as interstate business and is indispensable to both, and in moving material to the location of the bridge for the purpose of its repair, and in moving an engine from the roundhouse to be used in hauling an interstate train, and work partly intrastate and partly interstate as in preparing an engine to go out with a train made up of cars in interstate and in intrastate service, are all parts of an entirety having the efficient interstate commerce features required by the federal act. All work, so closely related to interstate commerce business as to be practically inseparable from it, though it promotes, at the same time, intrastate business, is in reality and legal effect a part of the former.

A further detail of the federal act, as it has been authoritatively construed, is important to this case. Any brief incidental absence from the scene of work or instrumentality used therein, which is not inconsistent with the employee's duty to his employer, does not, necessarily, preclude his efficiently claiming to be still on duty and engaged in interstate commerce. *North Carolina R. Co. v. Zachary,* 232 U. S. 248, 34 Sup. Ct. 305. Neither the period or nature or continuity of service, is changed by such a brief stepping aside from or cessation of activity as that of customarily visiting a wayside place for a lunch, or other legitimate and common means of refreshment, or waiting after one task shall have

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been done for orders as to the next movement,—the employee all the time being within customary reach for continuance of the day's service and holding himself in readiness to immediately respond. *Missouri, K. & T. R. Co. v. U. S.* 231 U. S. 112, 34 Sup. Ct. 26; *U. S. v. C., M. & St. P. R. Co.* 197 Fed. 624; *U. S. v. D. & R. G. R. Co.* 197 Fed. 629.

Applying the foregoing to the undisputed facts detailed in this case, it is considered that, if the trial court committed any error in leaving the question of whether respondent was engaged in interstate business at the time he was injured, to the jury, it was not in his favor; but rather was in favor of appellant. Work in the transfer yard was indispensable to the interstate business. Respondent had not been relieved for the day. His service from the time he started out in the morning until the instant of his injury and the work he then thought might be required of him, were inseparably connected with interstate business and, so, were a part thereof. The court, under the circumstances, would not have made any mistake by so deciding, as matter of law.

Complaint is made because the trial court did not compel respondent to elect whether he would claim under the federal law or under the state law. It does not appear that either side claimed the benefit of the former, while the learned court seems to have thought that the federal act ousted the state court of jurisdiction to apply the state law, regardless of the attitude of parties in the matter. This court has held to the contrary in the two cases heretofore cited, and they seem to be in harmony with the federal decision. *North Carolina R. Co. v. Zachary, supra.*

If either side claims the benefit of the federal act, it is fatal error not to apply it, if, within reasonable probabilities, the result might otherwise be more favorable to the party complaining. Here there was no error in refusing to compel respondent to elect, as there would have been none by refusing to compel appellant to do so. The advantages of the federal

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law were tendered by force of the law itself. It was up to the parties to accept or to stand indifferent. Both sides seem to have taken the latter course, throwing on the court the burden of submitting the cause as it might seem thereto the law required. Neither side made any objection to the federal law being applied. Respondent makes no complaint of the result. Appellant has no ground of complaint, and makes none, because of the law applied to the case, and could not, fairly, because opportunity was thereby afforded to reduce the damages actually sustained, on the ground of contributory negligence, if there were any. There was no proof of the law of Michigan, where the accident occurred, therefore the presumption is that it was the same as the law of this state which would have been more perilous to appellant than the federal law.

Enough has been said to indicate that, at the best for appellant, it was a jury question as to whether respondent ceased to be engaged in the service of appellant by leaving the right of way for a few moments with the intention of returning for further service, if necessary, before being relieved for the day. No reason is perceived which will justify disturbing the conclusion which the jury reached. Neither of the numerous cases cited to our attention, in principle, fits this one, while the federal cases are to the effect, as we have seen, that such incidents as the one in question do not, necessarily, break the continuity or nature of the service.

It is suggested that the federal act does not protect the injured person against the common-law defense of assumption of the risk, in such cases as this. Granted. The trial court so held. The case was submitted to the jury accordingly, resulting in a finding in respondent's favor. Assumption of the risk includes only such as the employee, expressly or impliedly, contracts to take upon himself because of being ordinary incidents of the particular business as ordinarily carried on, or as carried on in the particular case to his knowl-

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edge or under such circumstances that reasonable attention to his situation would afford him such knowledge. While, in a broad sense, it is a form of contributory negligence, actually, it is void of inadvertence and, technically, and essentially too, it is quite apart from contributory negligence in a closed sense of the term. *Knauer v. Joseph Schlitz B. Co., ante,* p. 7, 149 N. W. 494.

Thus it will be seen that there was no assumption of the risk here as matter of law. There was believable evidence, and much of it, that the movement of respondent which led to his injury, was a common one and that it was a safe one, subject to omission from the head end of the train or string of cars to give the customary signal by ringing the engine bell before starting. The assumption of risk saved to employers under the federal act as a shield against the consequences of injuries to employees, does not include risk of unexpected negligent acts of co-employees.

All the questions of fact in the case, material to appellant, seem to have been submitted to the jury, properly, and found upon believable evidence. To some of the justices, including the writer, the most serious question of all that might have been presented, is whether the verdict is not excessive. A motion was made for relief on that ground and the point saved for review; but it was not presented in the brief, nor was it on the oral argument. Under those circumstances, it is considered by the court that the judgment should not be disturbed, though it might under sec. 2405*m*, Stats., if necessary, to prevent a manifest failure of justice. I should say, in passing, that it is by no means certain that the amount of the recovery would, in any event be disapproved, though it is my personal view that it is plainly excessive and I incline to the idea of curing, what to me seems an injustice, by exercising the broad and beneficent change in the practice which was wrought by the section referred to.

By the Court.—The judgment is affirmed.

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INTERNATIONAL TEXTBOOK COMPANY, Respondent, vs. MABBOTT, Appellant.

SAME, Appellant, vs. SAME, Respondent.

December 11, 1914—January 12, 1915.

Guaranty: Consideration: Infants: Disaffirmance of contract: Liability of guarantor: Ignorance as to terms: Notice of acceptance: Waiver: Extension of time of payment: Notice of default of principal: Foreign corporations: Correspondence school: Interstate commerce.

1. A written contract of guaranty stating that it is "for value received," and clearly made for the benefit of the principal contractor, is supported by a legal consideration.
2. The rule that the liability of the principal debtor measures and limits the liability of the guarantor, does not obtain where the principal is an infant or otherwise incapacitated to contract and the guarantor knows thereof.
3. Thus, although an infant disaffirmed his contract to pay in instalments the price of a scholarship in a correspondence school, one who absolutely guaranteed the payment of such price in accordance with the terms of the contract is liable on such guaranty; and his liability is not limited to the amount due at the time of disaffirmance by the infant.
4. Where in such case the guarantor was not induced to sign the guaranty by any active misrepresentation, and immediately below his signature was a printed statement showing a plain intent that he was to assume an absolute obligation for a minor, mere ignorance of the contents of the writing or of the fact that the principal contractor was a minor would not relieve the guarantor from his obligation.
5. A guarantor may by a stipulation in the contract waive notice of the acceptance of his guaranty.
6. Where the contract of guaranty is an absolute and direct promise to pay if the principal debtor does not, so that upon acceptance the agreement is complete, the guarantor is not entitled to notice of acceptance.
7. Nor under such a contract need the guarantor be notified of a default by the principal debtor.
8. Mere indulgence to the principal debtor by a collector who had no authority to extend the time for payment, is not such an extension as would release a guarantor.

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9. A contract made in this state with a foreign corporation to pay for a course of instruction in a correspondence school located in another state, is one pertaining to interstate commerce, and may be enforced although the foreign corporation is not licensed, under sec. 1770*b*, Stats., to do business in this state.

APPEALS from a judgment of the circuit court for Douglas county: W. J. TURNER, Judge. *Modified and affirmed.*

The action is to recover the unpaid part of the contract price for a course of instruction in the correspondence school of the plaintiff. It is brought against the defendant as guarantor of an infant's contract.

The principal contract was made with one Clarence Johnston. He and plaintiff's agent requested *Mabbott* to sign as guarantor for Johnston. *Mabbott* testified that he was very busy at the time and did not pay much attention to it, but signed the contract as requested. The contract, dated March 16, 1912, was for a course of instruction in the plaintiff's correspondence school for which Johnston was to pay $53.55,—$5 down and $3 every month thereafter until the contract price was paid. Johnston paid the $5 down and one instalment of $3. Thereafter no more was paid.

At the trial in the justice's court the action was brought against Johnston and *Mabbott*. Johnston interposed the plea of infancy and disaffirmed the contract. The action was dismissed as to him upon proof of his infancy. The action was then prosecuted against the defendant *Mabbott* only, and by the judgment in the justice's court the action was dismissed. *Mabbott* testified that he did not know and was not informed that Johnston was an infant and that he did not read the paper.

A trial was had in circuit court upon appeal and judgment was entered for the plaintiff for the amount due on the contract up to the time Johnston disaffirmed the contract in justice's court, namely, the sum of $36, with interest and costs. From this judgment both parties appealed.

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H. G. Pickering, for the plaintiff.
Victor Linley, for the defendant.

SIEBECKER, J. The defendant avers that he is not liable on the contract of guaranty and asserts several different grounds to sustain his claim.

1. He asserts that the contract is not supported by any legal consideration. This position is untenable for the reason that the written guaranty subscribed by the defendant expresses on its face that it is based on a valuable consideration. It also clearly appears that the giving of the guaranty was clearly for the benefit of Johnston, the principal contractor. The consideration is clearly shown. *Dahlman v. Hammel,* 45 Wis. 466; *Young v. Brown,* 53 Wis. 333, 10 N. W. 394; *Jansen v. Kuenzie,* 145 Wis. 473, 130 N. W. 450.

2. It is claimed that defendant is not liable because it was shown that Johnston was a minor when the contract was made and that he refused to be bound by the contract after payment of the first monthly instalment of $3 and that he disaffirmed the contract soon thereafter. What steps were in fact taken by Johnston in disaffirmance of the contract are immaterial under the contract here involved and need not be further considered. It appears that the contract of guaranty was required by the plaintiff to secure payment of the price of the scholarship in accordance with the terms of Johnston's subscription, because Johnston was a minor. The contract of guaranty in its terms is an absolute promise by the defendant for a valuable consideration to pay the price of the scholarship in case of Johnston's default. While it is the general rule in such cases that the liability of the principal debtor measures and limits the liability of the guarantor, this rule does not obtain universally. One of the exceptions to the rule is where the principal contractor is an infant. This and other instances where the principal contractor is incapacitated to contract are excepted from the general rule for the reason

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that want of capacity of the principal to contract is the very reason for requiring that some party capable of assuming the obligation become a party thereto to secure its due performance if the party legally incapacitated to assume it omits to perform. The rule is aptly stated in *Winn v. Sanford,* 145 Mass. 302, 14 N. E. 119:

"Where one becomes a surety for the performance of a promise made by a person incompetent to contract, his contract is not purely accessorial, nor is his liability necessarily ascertained by determining whether the principal can be made liable. Fraud, deceit in inducing the principal to make his promise, or illegality thereof, all of which would release the principal, would release the surety, as these affect the character of the debt; but incapacity of the principal party promising to make a legal contract, if understood by the parties, is the very defense on the part of the principal which the surety assures the promisee." *Gates v. Tebbetts* (83 Neb. 573, 119 N. W. 1120) 20 L. R. A. N. S. 1000, note.

The transaction in question is clearly within this rule, and defendant may be held to his obligation in all its parts, though Johnston was a minor and refused to perform.

It is urged that the defendant was ignorant of Johnston's minority and hence should be relieved from the contract obligation. There is no claim made of active misrepresentation by either the plaintiff or Johnston to induce the defendant to sign the guaranty. At the foot of the guaranty contract and immediately below the signature of defendant is printed this: "Any student not of age who enrolls on the instalment plan must have the above guaranty signed by parent, guardian, employer or other responsible party of legal age." This shows a plain intent that the guarantor was to assume the obligation absolutely for the minor. The claim that the defendant, under the circumstances of haste, was excused from reading the contract or making inquiry of plaintiff's agent and Johnston as to the nature of the contract and his obligations as guarantor, is not supported by the evi-

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dence. It was his duty to know the contents thereof. Mere ignorance of its contents, under the circumstances of the case, does not permit defendant to avoid the obligation he assumed by signing it. *Mamlock v. Fairbanks,* 46 Wis. 415, 1 N. W. 167; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; *Van Beck v. Milbrath,* 118 Wis. 42, 94 N. W. 657.

3. It is contended that the defendant never became bound by the guaranty because notice of acceptance thereof was not given him. It is sufficient to call attention to the stipulation in his contract that he waived notice of the acceptance of the guaranty. This stipulation is binding on the defendant. *Crittenden v. Fiske,* 46 Mich. 70, 8 N. W. 714; *Swisher v. Deering,* 104 Ill. App. 572; *Hughes v. Roberts, J. & R. S. Co.* 24 Ky. Law Rep. 2003. It is also to be observed that the contract is an absolute and direct assumption by defendant to pay the price of the scholarship. There was nothing left to be done by the parties to complete the agreement aside from the acceptance by the plaintiff. When so accepted the agreements were complete. Contracts of guaranty like other agreements become binding upon the parties when they have mutually assented thereto. There is nothing in the agreements of these parties indicating any condition upon which the guaranty should become binding. On the other hand, every fact and circumstance of the transaction and the terms of the guaranty show an intent to make it an absolute agreement when signed and delivered. A guarantor under such a contract is not entitled to notice of acceptance. *Nading v. McGregor,* 121 Ind. 465, 23 N. E. 283; *Klosterman v. Olcott,* 25 Neb. 382, 41 N. W. 250; *Lachman v. Block,* 47 La. Ann. 505, 17 South. 153; *Davis S. M. Co. v. Richards,* 115 U. S. 524, 6 Sup. Ct. 173. See note to *William Deering & Co. v. Mortell* (21 S. Dak. 159, 110 N. W. 86) 16 L. R. A. N. S. 353.

4. The claim that the defendant was released by an extension of the time of payment of the instalments granted to

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Johnston by the plaintiff is not sustained by the evidence. The evidence does not establish that the party who called on Johnston for payment had any authority to grant him an extension of time of payment. The facts and circumstances in evidence do not show that an extension of time was in fact agreed upon. Mere indulgence to Johnston by the collector cannot be held to amount to an agreement to extend the time of payment. *Stephens v. Elver,* 101 Wis. 392, 77 N. W. 737; *Grafton v. Hinkley,* 111 Wis. 46, 56–58, 86 N. W. 859; *Benjamin v. Hillard,* 23 How. (64 U. S.) 149.

5. It is also contended that the defendant is not liable on the contract for want of giving him notice of the principal's default on the contract. The nature of this contract has been sufficiently adverted to. It is an absolute promise by the guarantor. In *Hubbard v. Haley,* 96 Wis. 578, 71 N. W. 1036, this court, in view of a conflict of authorities on the subject, adopted the rule that no notice of the default of an original promisor is required to be given a guarantor of absolute payment or performance to render him liable on the guaranty.

6. The contention that the plaintiff cannot enforce this contract because it is a foreign corporation and has not complied with sec. 1770*b*, Stats., in securing a license to transact business in this state, is not sustained. The case of *International Textbook Co. v. Peterson,* 146 Wis. 119, 130 N. W. 1134, shows that the holding of this court that such a license is required was reversed by the federal supreme court and that the plaintiff can enforce its contract as one pertaining to interstate commerce, and it is not affected by sec. 1770*b*, Stats.

7. The plaintiff appeals from the judgment of the trial court upon the ground that the court erred in limiting the amount of its recovery to $36 damages, and claims that it was entitled to recover the whole amount of the unpaid purchase price of the scholarship fixed by the contract. There is no dispute that the amount of the unpaid balance of the

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contract price is $45.55. It seems that the trial court took the view that defendant's liability was limited to an amount due on the contract from Johnston at the time he disaffirmed the contract. The trial court evidently concluded that such disaffirmance was established as of the time of the trial in the justice's court and found that $36 was then due from Johnston and limited recovery accordingly. We have seen that this is not a correct interpretation of the contract of guaranty and that defendant is liable for the whole amount due plaintiff under the contract of scholarship. Under the facts and circumstances shown the whole contract price is due. This necessitates a modification of the judgment by striking out the words and figures "thirty-six dollars ($36)" and inserting in lieu thereof "forty-five and 55-100 dollars ($45.55)," and striking out the words and figures "two and 28-100 dollars ($2.28) interest on said thirty-six dollars" and inserting in lieu thereof "five and 58-100 dollars ($5.58) interest on said forty-five and 55-100 dollars," and also striking out the words and figures "ninety-five and 69-100 dollars" and inserting in lieu thereof "one hundred eight and 60-100 dollars." As so modified the judgment is affirmed.

By the Court.—It is so ordered.

BEST, Appellant, vs. GREAT NORTHERN RAILWAY COMPANY, Respondent.

December 11, 1914—January 12, 1915.

Carriers: Injury to goods: Liability of initial carrier: Bill of lading: Carmack amendment: Shipment to foreign country: Deviation from contract: Evidence: Presumption: Competency: Instructions to jury.

1. Under a bill of lading, issued upon a shipment of goods from Superior to Winnipeg, stating that the carrier issuing it agrees to transport only over its own line and, except as otherwise provided by law, acts only as agent with respect to the portion of the route beyond its line, and that no carrier shall be liable for

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loss or damage not occurring on its portion of the route, except as such liability is or may be imposed by law, "but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed," the liability of the initial carrier was confined to its own line, unless a greater liability was imposed by law.

2. The Carmack amendment to the Interstate Commerce Act (34 U. S. Stats. at Large, 595, ch. 3591) applies only to shipments from one state to another, and not to a shipment from one state to a foreign country.

3. Where the contract of shipment was closed, bill of lading issued, and goods placed in the car, and defendant had held the car for forty days to accommodate the shipper and then, needing the car, wired for instructions and was advised that the shipper would return in a few days and would then send the car on to destination, it was not liable for negligence of a connecting carrier, as for deviation from contract, merely because it forwarded the car without awaiting the shipper's return.

4. Evidence that goods were properly carried by the initial carrier, without negligence or breach of duty, to the end of its line, and there delivered to the connecting carrier, in connection with the presumption against the last carrier, is *held* sufficient to support a finding of the jury that the goods were damaged after delivery to the latter.

5. Evidence that when the car in which plaintiff's goods were shipped arrived at destination, it being under seal while *en route*, there were found in it goods not shipped by plaintiff, would not justify an inference that the goods had been unloaded from the car after being placed therein and then injured in reloading.

6. In an action against a common carrier to recover for damage to household goods in transit, it being claimed by the defendant that the injury resulted from the goods not being crated, evidence was admissible as to the effect on such goods of being shipped a long distance without crating.

7. A recital in a bill of lading that the goods were "received in apparent good order," relates to the condition of the goods, not to the manner of loading, and does not relieve the shipper of the burden of proof as to proper loading.

8. An instruction to the effect that a railway company is not liable for damage to furniture caused by the ordinary jerks and jars of train movements, "or in stopping or starting of the trains," was not erroneous as giving the jury to understand that negligent stopping or starting of trains was referred to.

9. An instruction to the effect that in the absence of direct evidence that injury to goods in transit was caused by defendant, the initial carrier, the jury might presume that it was caused by the last carrier, was correct.

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APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

This action was brought to recover damages for injuries to plaintiff's goods by alleged failure to safely carry the same from the city of Superior to Winnipeg, Manitoba.

The answer denies generally the material allegations of the complaint, and sets up that defendant received the shipment on the 7th of April, 1910, to be carried over its line from Superior to Emerson, a point on the boundary line between the United States and the Dominion of Canada, and agreed to transport in the usual course of business pursuant to the terms of two agreements, viz. bill of lading and property release. The answer further sets up the special contract limiting liability; that the defendant received shipping orders and payment of freight, and in compliance with such orders the goods were shipped; that the property arrived at Emerson and was promptly delivered to the Canadian Northern Railway Company; that none of the property was damaged while on defendant's line, and if damage occurred at all it was while the property was on the Canadian Northern railroad.

The jury returned the following verdict:

"(1) Was the property in question damaged in transit from time of loading to delivery at Winnipeg? *A.* Yes.

"(2) If you answer question 1 'Yes,' in what amount was it damaged? *A.* $1,000.

"(3) Was the said property put into the car in such manner as to render the same reasonably secure against damage from transportation to Winnipeg under ordinary conditions? *A.* No.

"(4) If you answer question 3 'No,' to what extent, if at all, did the manner of loading the car contribute to the damage? *A.* $300.

"(5) If you answer question 1 'Yes,' was the damage to said property caused by any want of ordinary care on the part of the defendant or of the Canadian Northern Railway Company? *A.* Yes.

"(6) If you answer question 5 'Yes,' which of the two

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railroads caused such damage? *A.* Canadian Northern Railway Company."

The usual motions were made by plaintiff and denied and judgment entered for defendant dismissing the complaint, from which judgment this appeal was taken.

H. V. Gard, for the appellant.

J. A. Murphy, for the respondent.

KERWIN, J. Counsel for appellant contends that she was entitled to judgment on the verdict on four separate grounds, namely: (1) Because under the contract the defendant undertook to carry the goods through to Winnipeg. (2) Because the Carmack amendment to the Interstate Commerce Act makes the defendant, as initial carrier, liable for damages caused by the connecting carrier. (3) Because the defendant deviated from the contract of carriage and thus made itself an insurer; and (4) Because there is no evidence to support the finding of the jury that of the two roads the Canadian Northern Railway Company caused the damage.

1. The shipment was made under two so-called contracts, namely, a "bill of lading" and "property release." The bill of lading recited that the goods were received by defendant in apparent good order except as noted, consigned and destined to Winnipeg, and that defendant agreed to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to destination. The conditions made a part of the bill of lading provided, among other things:

"Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

"No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next car-

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rier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed."

The property release provided in substance that, in consideration of defendant having received the property from plaintiff for transportation from Superior to Winnipeg, the plaintiff released the defendant and all other transportation companies over which the property must pass to arrive at its destination

"from all liability from chafing, breakage, shrinkage, loss or damage of whatever kind, except such as may occur from negligence of company by collision of trains, or by cars being thrown from the track in course of transportation.

"And for the further consideration of the lower rate hereby secured, I do hereby declare the value of all property and goods shipped under this contract to be $10 dollars per hundred weight, said lower rate being given by the *Great Northern Railway Company* solely upon the basis of said valuation. And in consideration of said reduced rate, I further agree that, in case of loss or damage to said property, or to any part thereof, my recovery for such loss or damage shall not exceed the above valuation. . . ."

It is undisputed that the defendant road terminated at the Canadian line and that the property in question was delivered by defendant to the Canadian Northern Railway Company for carriage to destination. We think it clear under the terms of the contract of carriage between plaintiff and defendant that the contract confined the defendant's liability to its own line, unless such liability is imposed by law.

2. But it is argued that the Carmack amendment to the Interstate Commerce Act (34 U. S. Stats. at Large, 595, ch. 3591) makes the initial carrier liable, therefore the defendant is liable for damage occurring on the Canadian Northern road, to which said property had been delivered. The difficulty with this argument is that the Carmack amendment does not apply to the case because the shipment here

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was not from "a point in one state to a point in another state," but from a point in one state to a foreign country, and under such circumstances the Carmack amendment does not apply. *Burke v. G., C. & S. F. R. Co.* 147 N. Y. Supp. 794; *Houston, E. & W. T. R. Co. v. Inman* (Tex. Civ. App.) 134 S. W. 275.

3. There is no merit in the claim that defendant is liable for negligence of the connecting carrier because of deviation from contract with the shipper. After the goods were placed in the car, bill of lading issued, and contract of shipment closed, by which the goods were destined for Winnipeg, Manitoba, the car was by consent of parties permitted to remain at Superior for forty days or more on payment by the shipper of $1 per day. The defendant was not obliged to keep the car out of service by further holding it at Superior, and there was neither breach of contract nor deviation from any instruction which the plaintiff had a right to require compliance with.

4. It is further insisted that there is no evidence to support the finding of the jury that the damage occurred on the Canadian Northern railroad. True, there is little evidence, if any, of negligence on the part of the Canadian Northern Railway Company, or that the property was damaged while in possession of that road. But the evidence in the record in connection with the presumption that the damage occurred while the property was in the possession of the last carrier was sufficient to support the finding of the jury. Counsel for appellant, however, argues that the court erred in charging on this presumption against the last carrier. This court has ruled against such contention. *Stolze v. A. A. R. Co.* 148 Wis. 205, 134 N. W. 376; *Tradewell v. C. & N. W. R. Co.* 150 Wis. 259, 136 N. W. 794. Moreover, there is considerable evidence to the effect that the car was properly conveyed from Superior to the Canadian line, and that no negligence or breach of duty occurred while the car was in possession of

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the defendant, therefore we conclude that there was no error in refusing to disturb the finding of the jury on this point.

5. It is lastly argued that the court below should have granted a new trial on the ground of several alleged errors. Point is made that the court erred in excluding evidence to the effect that there were goods in the car when opened at Winnipeg not shipped by plaintiff. The evidence of conductors in charge of the car over defendant's line is to the effect that the car was under seal while passing over defendant's line. After it was loaded at Superior the warehouseman sealed it, but the evidence does not show how soon after loading it was sealed. The contention of appellant is that evidence that there were goods in the car which did not belong to plaintiff raised an inference that the goods were either partly or wholly unloaded from the car before shipment and put in storage and afterwards reloaded in a haphazard manner, and that such manner of reloading probably caused the damage. There is no basis in the evidence for such inference.

Counsel for appellant complains of the admission of evidence as to the effect on general household goods shipped a long distance without being crated. The contention in the case was that the damage to the goods was caused because they were not crated, and that issue was sharply contested. We think there was no prejudicial error in the admission of this evidence.

Error is assigned on the charge as to burden of proof. It is said that it was error to put the burden of proof as to proper loading of the goods upon the plaintiff, because of the recital in the bill of lading to the effect that the goods were received in apparent good order. The recital related to the condition of the goods, not to the manner of loading. It was the duty of the plaintiff to properly and safely load the goods in the car so they might be safely carried in the ordinary operations and movements of the train. The burden of proof that the goods were properly loaded was therefore upon the plaintiff.

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The court charged the jury as follows:

"You are instructed that the railway company cannot be liable for chafing or marking or scratching or the coming apart or other damage to the furniture caused by the ordinary jerks and jars of train movements, *or in stopping or starting of the trains.*"

The last part, "or in stopping or starting of the trains," is complained of on the ground that the jury would understand it to mean that the defendant could not be held liable for negligent stopping or starting of trains. We do not think the jury would so understand it, but on the contrary would understand it to mean the ordinary stopping or starting of the trains. Other parts of the charge make it clear that this was the construction intended, and must have been so understood by the jury.

The court charged:

"You may indulge the presumption, in the absence of direct evidence of negligence on defendant's part, that the damage did not result from negligence on the part of the defendant, and that such damage did result from negligence on the part of the Canadian Northern Railway Company. That last as applying to question 6."

This instruction was proper. *Stolze v. A. A. R. Co.* 148 Wis. 205, 134 N. W. 376; *Tradewell v. C. & N. W. R. Co.* 150 Wis. 259, 136 N. W. 794.

Some other errors are assigned by counsel for appellant, all of which have been examined. We find no prejudicial error in the record.

By the Court.—The judgment is affirmed.

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MENASHA WOODEN WARE COMPANY and others, Respondents, vs. TOWN OF WINTER and others, Appellants.

December 12, 1914—January 12, 1915.

Taxpayers' action: Who may maintain: Nonresident taxpayers: Question, how raised: Equity: Adequacy of legal remedy: Towns: When may exercise powers of village boards: Population, how determined: Census not conclusive: Ultra vires *acts: Estoppel: Town orders: Validity: Necessary parties: Illegal highway contracts: Laches: Claims: Allowing excessive amount: Contracts between town and its officers: Statute construed: Sale of property or thing in action: Services: Poor persons: Payment of their debts: Excessive supplies: Validation: Itemizing and verifying claims: Refiling: Allowance by electors: Street lighting: Costs against town officers.*

1. The question whether nonresident taxpayers of a town can maintain an action against the town and the holders of town orders alleged to be invalid, to set aside and annul such orders, is properly raised by answer setting up nonresidence and averring want of capacity to sue.
2. The wasting, by unlawful expenditure, of public funds raised by taxation is a wrong which affects resident and nonresident taxpayers alike, and either can maintain an action to redress the wrong.
3. Objection to an action by taxpayers to restrain the payment of illegal town orders, on the ground that the plaintiffs have an adequate remedy at law by paying the tax levied therefor under protest and suing for its recovery, or by an equitable action to remove the cloud upon their property created by the illegal tax, is not well founded, since a resort to either of those remedies would result in creating a deficit toward which they would have to contribute. Only by enjoining the payment of an illegal order can complete immunity be had against the illegality.
4. The levy of an illegal tax, the letting of contracts in contemplation of its collection, and the doing of work and issuance of town orders thereunder, presents more than a mere contemplated or threatened injury to taxpayers, and shows an existing equitable cause of action in their favor.
5. Upon the question whether a town having therein one or more incorporated villages has a population of 500, so as to enable it, by vote of the electors, to exercise the powers of villages and village boards, as provided in sub. 13, sec. 776, Stats. 1913, the

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federal census is *prima facie* evidence of the population it discloses; but, in the absence of any statutory declaration on the subject, neither that nor any other existing census can be held conclusive when the fact is challenged.

6. When the existence of the requisite population is put in issue, any evidence competent to establish the existence or nonexistence of the fact is admissible.
7. The rule against the impeachment of official documents does not apply to a challenge, in such a case, of the correctness of the enumeration of a state or federal census.
8. The doctrine of estoppel cannot be successfully invoked to sustain acts of a town which are clearly *ultra vires*. *McGowan v. Paul*, 141 Wis. 388, followed.
9. A judgment in a taxpayers' action cannot lawfully determine the validity of town orders not issued to nor held by any of the parties to the action, and the fact that the holders may be numerous or scattered cannot affect their right to be heard.
10. Error in a judgment in a taxpayers' action, in that it attempts to pass upon the validity of town orders held by persons not before the court, does not affect its validity in respect to orders held by the defendants in the action.
11. A contract by town officers in excess of their powers, as one for work upon a highway having no legal existence, is void and cannot be validated by performance on the part of the contractor.
12. Even if the doctrine of equitable estoppel could, under any circumstances, apply to such a case, there would be no ground therefor where the work was done upon premises which were never used for highway purposes, so that the town received no benefit therefrom.
13. An action brought in September to restrain the payment of town orders issued under illegal contracts made in the preceding June, cannot be defeated on the ground of laches.
14. Electors of a town cannot give away the money of the taxpayers, and an order based upon a vote of the electors allowing one of the supervisors $200 upon a claim of only $175, for loss of a horse, is void.
15. Sec. 4549, Stats. 1913, which makes it an offense for any town officer to have, reserve, or acquire any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any "purchase or sale of any personal or real property or thing in action," or in any contract or bid relating thereto, applies as well to sales by such officer directly to the town as to sales made by other persons in which he has or acquires an interest; and all contracts in contravention of the statute are absolutely void.
16. Said statute, being highly penal, must be strictly construed, and cannot be held to prohibit contracts for personal services.

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17. Where a merchant supplies goods to a poor person in excess of the amount authorized by the town supervisors, but in good faith upon the credit of the town, the town board may afterward, by ratification, validate such excess.
18. In a taxpayers' action to annul certain town orders, where the claims upon which the orders were issued were inadequately itemized or verified, the court, upon the trial, properly allowed the claims to be refiled, properly itemized and verified.
19. A town has no power to pay a debt of a poor person for house rent, or any other debt of such a person, which was not lawfully incurred on the credit of the town.
20. A claim for damages to a ladder, though small in amount, must be passed upon by the electors before the town board has authority to pay it.
21. A town has no authority to expend money for street lighting, and a purchase by the town board for that purpose is *ultra vires* and void.
22. The awarding of costs in a taxpayers' action to restrain the payment of illegal town orders, is a matter resting in the sound discretion of the trial court. Under the evidence in this case, which disclosed many irregularities and great looseness in the administration of town affairs, there was no abuse of discretion in awarding costs against the town officers and other defendants, but not against the town.

APPEAL from a judgment of the circuit court for Sawyer county: JAMES WICKHAM, Circuit Judge. *Affirmed in part; reversed in part.*

This is an action by nonresident taxpayers of the town of *Winter* against the town, the officers of such town, and the *First National Bank of Rice Lake* as owner of certain town orders, to declare void certain specified orders issued for the erection of a system of waterworks in the unincorporated village of Winter, located in said town; certain specified town orders issued for the building and repair of highways in said town; and also certain specified orders issued for various other purposes stated in the opinion. The validity of the town orders issued for the erection of the waterworks system and the bulk of the highway orders depends upon whether or not the town of *Winter* since 1910 has had the authority to exercise the powers of a town containing a population of 500

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or more. The United States census for 1910 showed that the town of *Winter* had a population of 516, and at the annual town meeting for 1911 the electors thereof passed a resolution pursuant to the provisions of sub. 13 of sec. 776, Stats. 1911, purporting to give the town board of said town all the powers relating to villages conferred upon them by ch. 40 of the Statutes. They also voted a tax levy of $6,000 for a waterworks system for the unincorporated village of Winter, and the next year they voted an additional $5,000 for the same purpose. These taxes were paid by the plaintiffs without objection. At the annual town meeting in 1913 the electors voted to levy an additional tax of $3,000 for waterworks purposes and a levy of $3,000 for highway purposes. The supervisors of the town voted an additional levy of $3,000 for highways. Sec. 1240, Stats. 1911, provides that "no town containing less than five hundred inhabitants shall levy or collect in any year a highway tax of more than two thousand dollars, including the amount voted by any town meeting and the amount levied by the supervisors."

The circuit court found that at no time during or since 1910 did the town of *Winter* have a population of 500 or more; that its population at no time exceeded 452 counting those who lived in the territory set off in 1911 to the town of Draper; and it held the orders issued for the waterworks void, and all orders in excess of $2,000 for highway purposes were also held void. A large number of other orders depending upon individual irregularities or want of authority were also set aside. Defendants have taken no exceptions to many of the court's findings and rulings, so these will not be set out *in extenso*. Only such as are questioned by the appeal will be noticed, and to avoid duplication of statement of facts none will be given here as to individual orders, as such facts would have to be restated more or less in the opinion. The plaintiffs' action affects only orders issued against the levy of 1913. The validity of prior levies is not questioned.

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For the appellants there were briefs by *W. F. Bailey* and *James Robbins,* and oral argument by *Mr. Bailey.*

For the respondents there was a brief by *J. C. Davis,* attorney, and *L. M. Sturdevant,* of counsel, and oral argument by *Mr. Sturdevant.*

VINJE, J. 1. The right of the plaintiffs to maintain the action is challenged on the ground that they are not residents of the town of *Winter.* Not being residents of the town, it is argued, they are not members of the corporation and have no standing in court to question its acts. The following Wisconsin cases are cited to show that such actions have always been brought by resident taxpayers: *Peck v. School Dist.* 21 Wis. 516; *Whiting v. S. & F. du L. R. Co.* 25 Wis. 167; *Judd v. Fox Lake,* 28 Wis. 583; *Lynch v. E., L. F. & M. R. Co.* 57 Wis. 430, 15 N. W. 743, 825; *Willard v. Comstock,* 58 Wis. 565, 17 N. W. 401; *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798; *Webster v. Douglas Co.* 102 Wis. 181, 77 N. W. 885, 78 N. W. 451; *Jenkins v. Bradley,* 104 Wis. 541, 80 N. W. 1025; *Mueller v. Eau Claire Co.* 108 Wis. 304, 84 N. W. 430; *Carpenter v. Christianson,* 120 Wis. 558, 98 N. W. 517; *Chippewa B. Co. v. Durand,* 122 Wis. 85, 99 N. W. 603; *Harley v. Lindemann,* 129 Wis. 514, 109 N. W. 570; *Wilcox v. Porth,* 154 Wis. 422, 143 N. W. 165. And extracts from opinions therein showing that emphasis is laid upon the fact that plaintiffs are resident taxpayers and therefore damaged by any misuse of corporate funds are quoted in aid of the contention that none but resident taxpayers can maintain the action. Counsel for plaintiffs claim this objection was first raised by a demurrer *ore tenus,* and cite a number of cases to show that it must be taken by special demurrer or answer. Counsel are mistaken in saying the objection arose upon a demurrer *ore tenus.* The answer alleges that "none of the plaintiffs in this action are residents of the town of *Winter,* nor have their office in

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said town, nor is such their principal place of business, and hence they are not members of the public corporation, the town of *Winter,* and have not the capacity to maintain this action." The question is therefore properly raised. It is a matter of some surprise that no action out of the many such brought in this state has been begun by nonresident taxpayers—especially in view of the fact that in large areas in the northern part of this state nonresident taxpayers pay half or more of the taxes. In the present case it is alleged and not denied that plaintiffs pay three fourths of the taxes of the town of *Winter.* Further than as a matter of surprise the fact can have no special significance upon the question of the right of plaintiffs to maintain the action. Neither is it particularly significant that in the actions referred to by counsel for defendants the court has used language appropriate to the facts therein and referred to plaintiffs as resident taxpayers or as members of the corporation—such being the fact. The vital question is, What wrong calls for a remedy in such cases? If it be a wrong peculiar to resident taxpayers or to members of the corporation only, then nonresidence might establish a line of demarcation. But such is not the fact. The wrong consists in the misuse of the taxpayers' money. And it affects resident and nonresident taxpayers equally. It is an ancient maxim of the law that "an action is not given to one who is not injured." 1 Corp. Jur. 915. The converse of the proposition is a maxim of equally early origin. An action is given to every one who is injured. Our constitution says "every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character." Art. I, sec. 9. It requires no argument to demonstrate that taxpayers who pay three fourths of the taxes of the town are injured by an unlawful expenditure of such taxes, no matter where such taxpayers live. It is the ownership of property subject to taxation within the town and not their residence that determines their

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obligation to contribute to the lawful expenses of the town. And when the fund so contributed, which belongs to all the taxpayers, is wasted, it affects resident and nonresident taxpayers alike. As was said in a similar case, "It is the private interest of the taxpayer, after all, that enables him to set judicial machinery in motion in a suit of this sort." *Chippewa B. Co. v. Durand,* 122 Wis. 85, 107, 99 N. W. 603. The plaintiffs, therefore, have a sufficient interest in the subject matter of the action to institute and maintain it. Having once been properly instituted, since it is brought in behalf of all the taxpayers of the town, the original plaintiffs might drop out entirely and still the action could proceed. The judgment recovered is for the benefit of all the taxpayers, not for the plaintiffs alone.

2. The objection that the plaintiffs have an adequate remedy at law by paying the tax under protest and suing for its recovery, or by an equitable action to remove the cloud upon the title of their property created by the illegal tax, is not grounded upon a substantial basis. This case is well adapted for illustrating the fallacy of the claim. If the payment of the orders is not enjoined they will be paid out of the taxpayers' money. If plaintiffs recovered their share of the illegal tax or three fourths, a deficit to that extent would be created which would have to be levied upon the taxable property of the town and the plaintiffs would have to pay three fourths of such deficit, so in the end they would have to pay nine sixteenths of the illegal tax even if they recovered their first payment. Taxpayers are entitled to complete immunity from an illegal tax where they seasonably bring their action. The result in case of an action to remove a cloud upon the title of their property would likewise be only a partial remedy. If they refused to pay the tax and succeeded in having their property escape the first tax levied against it, a similar deficit would occur which would have to be made up by a tax levied upon all the taxable property of the town. Only by en-

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joining the payment of an illegal order can complete immunity be had against the illegality. The fact that such a deficit was created by a misappropriation of funds would be no defense against a tax to repair such waste. *Willard v. Comstock*, 58 Wis. 565, 571, 17 N. W. 401. As was stated in the latter case, "The misappropriation of the public moneys forms a good ground for such an injunction by the citizen and taxpayer, because the corporation holds its moneys for the corporators, to be expended for legitimate purposes, and a misappropriation of the funds is an injury to the taxpayer for which no other remedy is so effectual or appropriate." Pages 571, 572. That the equitable remedy has frequently been recognized as the only adequate one will be seen by an examination of the following cases, all decided within the last twenty years: *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798; *Land, L. & L. Co. v. McIntyre,* 100 Wis. 245, 75 N. W. 964; *Webster v. Douglas Co.* 102 Wis. 181, 77 N. W. 885, 78 N. W. 451; *Mueller v. Eau Claire Co.* 108 Wis. 304, 84 N. W. 430; *Chippewa B. Co. v. Durand,* 122 Wis. 85, 99 N. W. 603; *Cawker v. Milwaukee,* 133 Wis. 35, 113 N. W. 417; *McGowan v. Paul,* 141 Wis. 388, 123 N. W. 253; *Schmidt v. Joint School Dist.* 146 Wis. 635, 132 N. W. 583; *McDougall v. Racine Co.* 156 Wis. 663, 146 N. W. 794.

3. The proof shows not merely a threatened injury to taxpayers, but a partially consummated one. As to many of the acts complained of, it was consummated as to everything except the payment of the outstanding orders. The alleged illegal tax was levied. Contracts were let in contemplation of the collection of the tax levy and work was done thereunder. Substantially the same state of facts appeared in *McGowan v. Paul,* 141 Wis. 388, 123 N. W. 253. Such a record presents more than a mere contemplated or threatened injury and shows an existing equitable cause of action, because nothing short of an injunction restraining the payment of the alleged illegal orders will prevent irreparable injury.

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4. Sub. 13 of sec. 776, Stats. 1913, provides that "All powers relating to villages and conferred upon village boards by the provisions of chapter 40 of the statutes, excepting those, the exercise of which would conflict with the statutes relating to towns and town boards, are conferred upon towns which contain a population of not less than five hundred and having therein one or more unincorporated villages, and may be exercised by the board of such town when directed by resolution of the electors thereof at an annual town meeting." Assuming the constitutionality of the act, the question arises, How shall the population be ascertained? The statute does not provide for the taking of a special census as do some statutes of a similar nature, nor does it make the last federal or any other census conclusive upon the question of population as do other statutes. The defendants insist that under such circumstances the last federal census controls, and, since the one for 1910 showed a population of 516, plaintiffs are concluded thereby and cannot introduce evidence to contradict it. Undoubtedly the federal census is *prima facie* evidence of the population it discloses, and it, or any other census, might by statute be made conclusive upon the subject. But in the absence of any statutory declaration to that effect no existing census can be held to be conclusive when the fact is challenged. The right of towns to exercise the powers of village boards is made dependent upon their having a population of not less than 500. When that fact is put in issue, any evidence competent to establish the existence or nonexistence of the fact is admissible. The United States census was ascertained by an enumeration. Plaintiff introduced evidence of an enumeration giving the names and residences of every person enumerated. Had it not been substantially correct it would have been easy for defendants, who were officials and residents of the town, to show its incompleteness. This they failed to do. The court found that at no time since 1910 had the town of *Winter* contained a population of 500. In

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April, 1913, it had only 360. If to these are added the 92 that lived in the territory set off in 1911 to the town of Draper, it would make only 452. So it is not necessary to decide whether or not the town of Draper had a legal existence prior to the town meeting of 1911. Assuming that it was then still a part of the town of *Winter,* the town would nevertheless lack the required population. The findings of the court as to the population are supported by the evidence and cannot be disturbed. Counsel for defendants cite a long list of cases to the effect that official documents cannot be impeached collaterally and argue the subject at great length in their brief. It is deemed unnecessary to review such authorities and point out their lack of application to the question here to be determined, which is, How shall the fact that a town had a population of 500 or more at a given time be ascertained in the absence of any statutory declaration that it should be by the last census, either state or federal, or by special enumeration, or otherwise? Obviously by any evidence competent to establish the existence or nonexistence of the disputed fact. The federal census was competent but not conclusive evidence of the fact. Nor are cases like *State ex rel. Terry v. Keaough,* 68 Wis. 135, 31 N. W. 723, helpful or in point. There the statute provided the population should be determined "by the last preceding enumeration by the state or general government." That fixed the method of determining the fact. In the present case the statute does not prescribe how it shall be determined. The general rules of evidence therefore apply.

The state census has been abolished. The federal census is taken once every ten years. Hence a very good reason existed why the legislature did not make the federal census the test of population. If it had, many rapidly growing towns in the northern part of the state might have to wait nearly ten years after they actually had a population of 500 or more before they could exercise the rights granted by the statute.

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It was no doubt deemed quite safe to depend upon the actual fact as to what the population was, since it is not very difficult to determine with accuracy a population up to 500, even though scattered as it is in frontier towns. By making it depend upon the actual number of inhabitants, towns can exercise the right whenever they have the required number. There would be no long period of waiting for official enumeration. A special enumeration could of course have been provided for, but it was not, and it is idle to speculate why. As already stated, the court upon sufficient competent evidence found the town of *Winter* has since 1910 never had a population of 500 or more. It was therefore not lawfully authorized to exercise the rights which sub. 13, sec. 776, Stats. 1913, confers upon towns having a population of 500 or more, and its attempt to construct and operate a system of waterworks in the village of Winter was in excess of its corporate powers and void. The same result follows as to its attempt in 1913 to levy more than $2,000 for highway purposes.

5. The present case presents perhaps as strong grounds for holding plaintiffs estopped from questioning the validity of the acts of the town relative to the construction of the waterworks system as can well be imagined. The United States census showed the town to have a population of 516 in 1910. The next year the electors voted to avail themselves of the power granted to towns having a population of 500 or more. It also voted to levy $6,000 for a waterworks system. Plaintiffs paid their share of such tax, or three fourths thereof, without question or protest. The next year a further levy of $5,000 was made and such tax was likewise paid by plaintiffs without demur. Not until after the final levy of $3,000 for waterworks was made at the annual town meeting in April, 1913, did the plaintiffs raise any objection to the power of the town to make the levy. Certainly if estoppel can apply to *ultra vires* acts of a town it ought to apply here. The equity of the application of the doctrine of estoppel is

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keenly sensed by the court. But to apply it would not only be to overrule the recent well considered case of *McGowan v. Paul,* 141 Wis. 388, 123 N. W. 253, but it would be the establishment of a rule whereby a town by common consent could assume any powers it saw fit to exercise. If the doctrine of estoppel could be successfully invoked in support of the exercise of clearly *ultra vires* powers, legislative limitations upon the exercise of corporate powers, whether private or public, would depend for their effectiveness not upon the will of the grantor of the power but upon that of the grantee. It is one thing to apply the doctrine to the irregular use of a power that exists, and quite another thing to create a forbidden power by a forbidden act. The former is nothing more than a waiver of the regularity of the exercise of a power which the municipality may exercise—a valid ratification of an irregular act because there was the power to exercise it regularly. The latter would be the creation by an unlawful act of a power expressly withheld. Neither public nor private corporations can successfully assert the validity of *ultra vires* acts on the ground that the members thereof have consented to their commission. It is better that occasional hardships should occur under a rule which confines corporate acts within lawful channels than that the line of demarcation between what is lawful and what is unlawful should be swept away or be made to depend upon the choice of the creature and not upon that of the creator. The ground is quite fully gone over in the case of *McGowan v. Paul,* 141 Wis. 388, 123 N. W. 253, where some of the previous cases are reviewed, and the result there reached upon the subject is adhered to.

6. The court declared void a number of orders not issued to or held by any of the defendants in the case. In this it committed error. The payees or holders thereof are entitled to their day in court upon the question of their validity. The case of *Giblin v. North Wis. L. Co.* 131 Wis. 261, 270, 111 N. W. 499, is relied upon to sustain this part of the judg-

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ment. In that case, however, the persons who were held bound by the judgment in a taxpayers' action were parties thereto and the validity of the orders declared void was in issue in such taxpayers' action. They had therefore had their day in court upon that question and the judgment entered therein was for that reason held binding upon them. Here neither the holders nor the payees of the orders have had any opportunity to defend. Rights of property or of persons cannot be thus conclusively adjudicated without an opportunity on the part of the persons affected thereby to be heard. *Siegel v. Outagamie Co.* 26 Wis. 70; *Crites v. Fond du Lac Co.* 67 Wis. 236, 30 N. W. 214. No attempt was made to serve either the payees or holders of the orders. The fact that they were numerous or scattered cannot affect their rights. In so far as the judgment declares void, or enjoins the payment of, orders in the hands of persons not parties to the action it is reversed.

7. Such reversal in no wise affects the validity of the judgment declaring void the orders held by the defendants in the action. They have had as full and adequate an opportunity to show the validity of their orders as they would have had if the holders of all the orders had been in court. They have in no wise been prejudiced by a failure to bring them all in nor is the judgment against them different than it would have been upon the same evidence with all the holders of orders made parties to the action. As to each holder the controversy was a separable one and the action might proceed to judgment against them all or against a part only.

8. Two orders of $200 each were issued to one Crawford and an order for $138.85 and one for $330 were issued to one Hollen, drawn on the road fund for services performed by them in building roads in the town of *Winter*. The trial court found:

"That all of said work was performed on premises where no legal highway was laid out and where the town board of

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said town had taken some proceedings to lay out a highway but had failed to make, sign, or record any order laying out the same, and that said premises were never used for highway purposes, except that order number 1043 for $138.85 was for labor performed and expenses incurred at a place where no highway was attempted to be laid out, but said Hollen performed some services upon private property by mistake as to the true location of the line; that none of said orders represent any valid indebtedness of said town or any services or expenses for which the town received any benefit, and that said orders are all void."

The correctness of this finding is challenged by the defendants, as well as the conclusion that the orders are void because work was performed upon roads not legally laid out. It is also urged that plaintiffs have been guilty of such laches in bringing the suit as to prevent them from questioning the validity of the expenditure. We have examined the evidence relating to the attempted laying out of the highway and are satisfied that it sustains the finding made. A portion of the finding is based upon somewhat conflicting evidence, but the material parts thereof are sustained by the town records themselves and by uncontradicted evidence. It was held in *Beyer v. Crandon,* 98 Wis. 306, 73 N. W. 771, that a contract with a town for work upon a highway having no legal existence is illegal. This holding was based upon the ground that a contract by town officers in excess of their power is void, and cannot be validated even by performance on the part of the contractor. It was there said:

"If it be true that town officers can contract with a person for work for their town without any authority so to do, under such circumstances that such person is chargeable with knowledge of such want of authority, and he can yet perform the contract and then recover of the corporation on the ground that it has received the benefit of his labor, a very easy road to the creation of indebtedness against towns exists, whereby taxpayers can be burdened with ruinous taxation without any adequate means of redress; but such is not the law." Pages 310, 311.

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In that case equitable estoppel was held not to apply, though the town had had the benefit of the road. Here the trial court finds that the premises upon which the work was done were never used for highway purposes and that the town never received any benefit by reason of the services or expenses for which the compensation was claimed. The case is therefore barren of any valid claim of an equitable estoppel even if it were one where the doctrine would apply. But, as has already been pointed out, it cannot be invoked to vitalize an act illegal because of an absolute want of power to act at all.

Neither can the defense of laches prevail. The Hollen contract was let June 16th and the Crawford contract June 23d and the work presumably done later. This action was begun the following September. Under the circumstances plaintiffs must be deemed to have acted with reasonable promptness.

9. An order for $200 was issued to *Mont Wiley*, one of the supervisors of the town, for the loss of a horse which fell into a trench dug for the waterworks system in or near an alley in the village of Winter. *Wiley* had made a claim for $175 for the loss of the horse. The records of the town clerk show that at the noon hour of the annual town meeting of April 1, 1913, the electors voted to allow the claim in the sum of $200. The trial court found that the claim did not represent any valid indebtedness of the town; that there existed no such claim or indebtedness or disputed controversy upon any material question which would empower the electors of the town to authorize the payment of the claim. The finding is sustained by the evidence. Conceding that the resolution was regularly passed and actually voted upon during a time when the electors were lawfully transacting business, still the record shows upon its face that the order was void because based upon an allowance of $200 for a claim of only $175. Electors cannot give away the money of the taxpayers. The court correctly held the order void.

10. An order for $17.25, another for $71.43, and another for $44.67 were issued to the defendant *Nutting*, who was

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town treasurer, for plank sold by him to the town. These orders are now held by the defendant *Bank of Rice Lake.* Another order for $36.23, but not held by the bank, was also issued to *Nutting* for plank sold the town. These orders were held void because the sale was in violation of the provisions of sec. 4549, Stats. 1913, which reads:

"Any officer, agent or clerk of . . . any . . . town, . . . or in the employment thereof, . . . who shall have, reserve or acquire any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any way or manner, in any purchase or sale of any personal or real property or thing in action, or in any contract, proposal or bid in relation to the same, . . . shall be punished by imprisonment in the county jail not more than five years or by fine not exceeding five hundred dollars."

The sale of plank to the town by *Nutting,* who was the treasurer thereof, came directly within the statutory condemnation. The argument that the statute was intended to apply only to sales made by persons other than officers or agents is not well founded. The language applies equally well to a sale made directly by an officer to the town, and the mischief sought to be prevented is as great in such a case as it would be where the sale was made by some third party in which the officer had an interest. In the latter case it would usually be a partial interest. In the former the whole interest of the vendor is in the officer selling. The statute was undoubtedly framed for the purpose of putting beyond the reach of officers any temptation to sell supplies to towns or municipalities of which they are officers or agents. It cut off all sales between them and the municipality they represented, so that they should not act both as seller and buyer. It also prohibited their acquiring an interest in the sales of others to the municipality. That contracts made in contravention of the statute quoted or similar statutes are absolutely void was settled in *Land, L. & L. Co. v. McIntyre,* 100 Wis. 245, 75 N. W. 964, and in *Quayle v. Bayfield Co.* 114 Wis. 108, 89 N. W. 892.

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11. Two orders, one for $15.25 and one for $37.75, were issued to one Ordway for blacksmith work done for the town. He was also employed by the town as night watchman. The court disallowed so much of the above orders as represented work done while he was acting as night watchman because contrary to the provisions of sec. 4549, Stats. 1913. The section is a highly penal one and must be strictly construed. While the reasons against an agent or officer of the town selling his labor or time to it may be as persuasive as those against his selling personal or real property to it, still the fact remains that there is no statutory inhibition against it. The court can make none. The language of the section is plain and unambiguous. It relates to the "purchase or sale of any personal or real property or thing in action, or in any contract, proposal or bid in relation to the same." Performing services for the town cannot be construed to be a purchase or sale of any personal or real property or thing in action within the meaning of the section. There is nothing to show that Ordway's duties as night watchman were in any way interfered with or made less effective by the blacksmith work which he performed for the town. That part of the judgment declaring a portion of these orders void is reversed.

12. A number of poor persons were either wholly or in part supported by the town. There is evidence to the effect that the proprietor of a store called the Winter Emporium was informed by the supervisors of the town that certain persons would be aided by the town to the extent of $15 per month. More than this was furnished them and the bills were afterwards audited and allowed. The evidence is not very clear that the town board fixed any definite sum beyond which aid would not be furnished. But assuming it did, the matter of the amount to be furnished was discretionary with them. They could have allowed a larger amount in the first instance. A larger amount was furnished. They could ratify what they might have done originally. There is no showing that more than what was reasonably necessary was

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furnished. The goods were sold with the understanding that the town would pay for them, and credit was given the town. In the absence of fraud or collusion the town board may, if reasonably necessary, increase the amount already fixed upon in aid of a poor person, and such increase in amount may take the form of ratification where credit was in good faith given the town. That part of the judgment declaring void a portion of orders Nos. 964, 1040, 1127, and 1128 is reversed.

13. A number of claims passed upon by the town board were inadequately itemized or verified. The court permitted these claims to be refiled properly itemized and verified. Plaintiffs objected and took exceptions to the court's ruling. Such exceptions are urged in favor of the judgment, but they cannot avail plaintiffs anything. The court properly allowed the claims to be corrected in the respects mentioned, or perfect claims to be substituted for imperfect ones.

14. An order for $15 for the rent of a house for the months of March, April, and May occupied by a Mrs. Buckner, who received aid from the town, was issued to the owner of the house. It appears that most of the rent accrued before Mrs. Buckner became a town charge and no understanding or agreement was shown to the effect that the town should in any way become liable for the rent. The order was properly declared void. A town has no authority to pay the debts of poor persons. It is chargeable with the duty of presently caring for and aiding them when in need, but it has no power to pay their past debts or debts not lawfully incurred on the credit of the town.

15. Claim is made that the court improperly cut down the bills of the supervisors for per diem services and livery hire. We have examined the evidence relative thereto and from such examination have reached the conclusion that the court's findings as to those matters must stand. The same result is reached as to the claim of Van Alstine for damages to a

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ladder. The electors had not passed upon the claim and the town board was without authority to allow it, though small in amount.

16. The order to the Winter Emporium for furnishing oil for lighting the streets of the village of Winter was properly declared void. The town had no authority to expend money for lighting streets and the purchase was wholly *ultra vires.*

17. The court awarded costs against all the defendants except the town of *Winter.* The awarding of costs is a matter resting in the sound discretion of the trial court. We cannot say there was any abuse of discretion in the instant case. A reading of the evidence discloses a lamentable looseness in the administration of the affairs of the town of *Winter,* and in many cases an apparent disregard of the rights of the taxpayers and the obligations placed upon the supervisors by law. Many irregularities were corrected by the trial court in this case, not involved in the appeal. These were correctly taken into account in determining the question of costs.

By the Court.—The judgment is affirmed except (1) that part thereof which adjudges void orders issued to payees or holders not parties to the action; (2) that part thereof adjudging void a portion of the orders issued to Ordway; and (3) that part thereof adjudging void a portion of orders Nos. 964, 1040, 1127, and 1128 issued to the Winter Emporium for supplies furnished poor persons. As to the excepted portions the judgment is reversed, and the cause is remanded with directions to enter judgment in accordance with this opinion. No costs are allowed upon the appeal. The appellants will pay the clerk's fees.

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WEBSTER MANUFACTURING COMPANY, Respondent, vs. MONTREAL RIVER LUMBER COMPANY, Appellant.

December 12, 1914—January 12, 1915.

Contracts: Validity: Sunday: Confirmation by subsequent letters: Damages: Computation: Changing jury's finding.

1. Although a telephone conversation between the parties on Sunday did not constitute a binding contract, letters which followed and confirmed such conversation and which were complete and specific in their terms constituted a valid written contract.
2. Where, upon the other facts found by the jury in an action for breach of a contract to deliver lumber, the total amount of damages was simply a matter of mathematical computation, it was proper for the trial court to make such computation and to modify, in accordance therewith, the gross sum found by the jury.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

Action for breach of contract to deliver lumber. Plaintiff manufactures chairs at Superior, and defendant operates a sawmill in Iron county. May 11, 1912, the parties made a written contract by which defendant agreed to sell and deliver to plaintiff "all number two common and better grades of basswood and soft elm lumber then sawed or to be sawed during the season of 1911–1912 at its said mill in Iron county," further agreeing that the quantity should be 250,000 feet or more of basswood and 100,000 feet or more of elm, shipment to begin September 1, 1912, and to continue at the rate of not more than one carload a day or three carloads per week, to be completed by December 1, 1912, the plaintiff agreeing to pay therefor as follows:

"Basswood:
"For grades first and second, $36 per M feet.
"For grade number one common, $26 per M feet.
"For grade number two common, $17 per M feet.
"Soft elm:
"For grades first and second, $34 per M feet.

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"For grade number one common, $24 per M feet.
"For grade number two common, $15 per M feet."

In June, 1912, and before delivery of any lumber the defendant's mill was destroyed by fire and defendant became unable to fulfil the contract by December 1st. On Sunday, September 1st, Mr. Highfield, president and manager of the plaintiff, had a telephone conversation with Mr. Meyers, the president and general manager of the defendant, with regard to the matter, and their versions of the understanding arrived at differ radically. Mr. Highfield's version is that Mr. Meyers told him that they could not deliver the lumber on account of the fire and he would like to continue the contract; that he would furnish the full amount specified in the contract and also the full sawing of the mill on basswood and soft elm for 1913 at the same price and on the same terms as the contract of May 11, 1912; that he (Highfield) replied that "if it was satisfactory for him to get us his next year's as promised" the plaintiff would continue the contract as requested under the same terms and conditions, "and he said he would confirm it." Mr. Meyers testifies that he called Mr. Highfield up and explained to him that the mill had burned and they would not be able to fill the contract within the time limit, but that they would begin sawing and filling the contract as soon as possible, but that shipments would probably not begin before spring; that Highfield agreed to allow the extension and asked if defendant expected to manufacture other lumber and he (Meyers) said "Yes," and Highfield asked if he could have it, to which Meyers replied that defendant would be glad to sell him any lumber they had for sale at any time; that nothing was said about price.

Following this conversation and on September 17, 1912, Meyers wrote a letter to Highfield containing the following sentence:

"Confirming conversation which we had over the phone regarding the lumber which we expect to produce during the

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next season, we will ship same to you at the same price and under the same contract."

To this Mr. Highfield replied by letter September 19th, as follows:

"Regarding the conversation with your Mr. Meyers over the phone, Sunday, September 1st, we wish to mention here the understanding the writer had on same and wish to confirm it as a matter of record for our files, that you are unable to fill the contract of May 11, 1912, between your company and this company on soft elm and basswood lumber for the quantities stated therein, the time specified in said contract, and that you wish the contract continued until next year; that we agree to continue the same for you, for which you agree to complete our contract next year, 1913, and to deliver to us as much more than the quantity called for in the contract as you might saw; in other words, you would increase the quantities provided for in the contract as much as possible and would give us your entire output of soft elm and basswood, 1½", and that you would instruct your sawers to saw all soft elm and basswood to this thickness from now on.

"This we beg to confirm and believe we have stated the conversation correctly, and as we are now ready for shipments we beg to ask that you let them go forward at once."

To this Mr. Meyers replied September 23d, as follows:

"As to the balance of your letter, will state that we expect to let you have all the elm and basswood which we manufacture during the balance of 1912 and 1913. We hope that it will be very much more than the amount claimed under your contract. Of course, this will be conditioned upon the inspection, which we assume will be satisfactory."

The jury by special verdict found (1) that by the telephone conversation of September 1st the parties came to the understanding that defendant was to deliver to plaintiff all its soft elm and basswood output of the then following season; (2) that Mr. Highfield's version of that conversation was substantially true; (3) that the defendant failed to deliver 165,000 feet of basswood and 20,854 feet of elm;

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(4) that the plaintiff's damages for nondelivery of the lumber were $771.51; (5) that the market price of lumber in the summer and fall of 1913 was as follows:

"Basswood, first and second, $39.25.
"Basswood, No. 1 common, $30.25.
"Basswood, No. 2 common, $21.25.
"Elm, first and second, $42.
"Elm, No. 1 common, $32.
"Elm, No. 2 common, $20."

On plaintiff's motion the trial judge increased the plaintiff's damages to $806.42 and rendered judgment for that amount, from which judgment the defendant appeals.

A. W. McLeod, for the appellant.

H. V. Gard, for the respondent.

WINSLOW, C. J. Doubtless the telephone conversation did not constitute a binding contract for the reason, among others, that it took place on Sunday. However, the letters which followed the conversation seem to be complete and specific in their terms, and we think the trial court was entirely justified in holding that they constituted a written contract which was in all essentials in accordance with the plaintiff's version of the telephone conversation.

There was no error in changing the amount of the damages found by the jury. That body having found specially the market prices of the various qualities of lumber covered by the contract, and there being no dispute in the evidence as to the percentages of the various contract qualities of lumber contained in the undelivered lumber which defendant had at its mill and refused to deliver, and no dispute as to the amount of undelivered lumber, the total amount of damages was simply a matter of mathematical calculation. The court made the calculation and modified the gross sum found by the jury in accordance therewith. This was an eminently proper course.

By the Court.—Judgment affirmed.

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VAN DYKE, Respondent, vs. CITY OF MILWAUKEE, Appellant.

March 20—April 9, 1914.
December 12, 1914—January 12, 1915.

Taxation: Income tax: What is "income:" Dividends from mining corporation: Deductions allowable: Depreciation of mining stock: Premiums paid on bonds: Personal property taxes: Offset: Statutes: Construction.

1. The word "income" in the constitutional amendment authorizing the levying of an income tax and in the statute enacted in pursuance thereof is used in its common, ordinary meaning and not in its strict, technical, or true economic sense; and it includes ordinary dividends paid by going corporations, mining corporations as well as others.
2. For purposes of income taxation such ordinary dividends will be conclusively presumed, as against stockholders, to be from earnings or profits.
3. A stockholder cannot be permitted, under sub. (a), (b), sec. 1087*m*—4, Stats. 1911, to deduct from the dividends paid by a mining company, under the guise of "losses," the depreciation in the value of his stock caused by such distribution of dividends.
4. Dividends declared and distributed during 1911 out of surplus on hand prior to January 1, 1911, when the Income Tax Law went into effect, are taxable as income of the year 1911, since the profits of a corporation become income to stockholders when distributed as dividends and not before.
5. When only part of the income of a corporation is taxed in this state, a stockholder should be allowed, under sub. (c), sec. 1087*m*—4, Stats. 1911, a proportionate and not a total deduction of dividends, in computing the amount of his taxable income.
6. The fact that a corporation disposed of its mining properties in exchange for stock in another corporation would not affect the taxable character of the dividends declared by it, after such exchange, out of surplus moneys or profits on hand.
7. The fact that a person purchased bonds at a premium does not entitle him to deduct annually from the interest received a *pro rata* share of such premium in order that the capital may be kept unimpaired and that it may not be taxed as income.
8. Under sec. 1087*m*—26, Stats. 1911, one who paid a tax on his personal property for the year 1911 was entitled to have the amount so paid deducted from the tax on his income for that year. WINSLOW, C. J., and SIEBECKER, J., dissent.

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9. When a statute, giving its language its ordinary and natural meaning, expresses a result neither absurd nor harsh, but on the contrary one in harmony with the general scheme of the law, namely, that an income tax shall, substantially, become a substitute for a personal property tax, then such natural and ordinary meaning should be given to the language used, and there is no room for construction.

10. A practically contemporaneous construction by an administrative department cannot be successfully invoked to override a plain meaning of the statute.

BARNES, J., dissents.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Action to recover part of an income tax paid by plaintiff under protest to the defendant, the city of *Milwaukee,* upon income for the year 1911. The defendant demurred to plaintiff's amended complaint and appealed from an order overruling its demurrer.

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Garfield S. Canright,* assistant city attorney, and oral argument by *Mr. Canright.* They argued, among other things, that dividends from mining stocks are "income" within the intent of the law. *Stratton's Independence v. Howbert,* 231 U. S. 399, 34 Sup. Ct. 136, 140; Seligman, Income Tax, 19; *Central Nat. Bank v. U. S.* 137 U. S. 355, 11 Sup. Ct. 126; *Comm. v. P., Ft. W. & C. R. Co.* 74 Pa. St. 83; *Hyatt v. Allen,* 56 N. Y. 553; *Matson's Ford B. Co. v. Comm.* 117 Pa. St. 265, 11 Atl. 813. Such dividends are assessable as of the year received, the stockholders having no property in them until declared. *Gibbons v. Mahon,* 136 U. S. 549, 10 Sup. Ct. 1057; *Hyatt v. Allen,* 56 N. Y. 553. Where a corporation pays a tax on only a part of its income the deduction to the stockholder should be limited to such proportion at least. *Sturges v. Carter,* 114 U. S. 511, 5 Sup. Ct. 1014; *State ex rel. M., St. P. & S. S. M. R. Co. v. Railroad Comm.* 137 Wis. 80, 117 N. W. 846; *State ex rel. Second Ward Sav. Bank v. Leuch,* 155 Wis. 493, 144 N. W.

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1119. Premiums paid for bonds cannot be amortized. *Gillatt v. Colquhoun,* 33 W. R. 258. The income tax was intended as a substitute for the personal property tax, which had proven a failure, and the property tax paid in any year was only to be offset against income tax *due* in that year, not that assessed upon income of the year in which the tax was paid. *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164.

Geo. D. Van Dyke, respondent, *in pro. per.,* contended, *inter alia,* that a mine is a capital asset, and sales of ore therefrom are not income and cannot be subjected to a graduated and progressive income tax. *Gray v. Darlington,* 15 Wall. 63; *U. S. v. Nipissing M. Co.* 202 Fed. 803; *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164; *Estate of Wells,* 156 Wis. 294, 144 N. W. 174; *Miller v. Payne,* 150 Wis. 354, 136 N. W. 811; *Soehnlein v. Soehnlein,* 146 Wis. 330, 131 N. W. 739; Howes, Income & Principal, 1, 2, 4, 17, 34; *Mercer v. Buchanan,* 132 Fed. 508; McCullough, Prin. of Pol. Econ. 530; Seligman, Income Tax, 19; 50 Albany Law Jour. 300; *Waring v. Savannah,* 60 Ga. 93; *Levi v. Louisville,* 97 Ky. 394, 30 S. W. 973; *Mundy v. Van Hoose,* 104 Ga. 292, 30 S. E. 783; Black, Income Taxes, secs. 32, 34, 45; *Stevens v. Hudson's Bay Co.* 25 Times Law Rep. 709; *Tebrau R. Syndicate v. Farmer,* 47 Scot. Law Rep. 816; *Iowa State Sav. Bank v. Burlington,* 98 Iowa, 737, 61 N. W. 851; *Spooner v. Phillips,* 62 Conn. 262, 24 Atl. 524; *Merchants' Ins. Co. v. McCartney,* 1 Low. Dec. 447; *Sargent L. Co. v. Von Baumbach,* 207 Fed. 423; *Gowan v. Christie,* L. R. 2 H. L. 273, 284; *Duff's Appeal,* 10 Sad. (Pa.) 483, 14 Atl. 364; *Blakley v. Marshall,* 174 Pa. St. 425, 34 Atl. 564; *Williamson v. Jones,* 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694; *Coltness I. Co. v. Black,* L. R. 6 App. Cas. 315; MacSwinney, Mines, 555; *Alianza Co. v. Bell,* [1904] 2 K. B. 666; Jarvis, Income Tax, 53; *Wells v. Green Bay & M. C. Co.* 90 Wis. 442, 64 N. W. 69; *People ex rel. United Verde*

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C. Co. v. Roberts, 156 N. Y. 585, 590, 51 N. E. 293; *Excelsior W. & M. Co. v. Pierce,* 90 Cal. 131, 27 Pac. 44. Upon other points involved he cited *Richardson v. St. Albans,* 72 Vt. 1, 47 Atl. 100; *Comm. v. Cent. T. Co.* 145 Pa. St. 89, 22 Atl. 209; *Allis's Estate,* 123 Wis. 223, 101 N. W. 365; Black, Income Taxes, sec. 103; Howes, Income & Principal, 13–16; *Curtis v. Osborn,* 79 Conn. 555, 65 Atl. 968; Banking Law Jour. May, 1909; *New York L. I. & T. Co. v. Baker,* 165 N. Y. 484, 59 N. E. 257; *In re Hoyt,* 27 App. Div. 285, 50 N. Y. Supp. 623; *Hemenway v. Hemenway,* 134 Mass. 446; *First Nat. Bank v. Douglas Co.* 124 Wis. 15, 102 N. W. 315.

The following opinion was filed April 9, 1914:

VINJE, J. The demurrer to the complaint raises a number of important questions relative to the construction of our Income Tax Law. Some of these questions, it is deemed, can be briefly, yet adequately, stated in abstract form.

1. In the case of a going corporation engaged exclusively in mining and marketing ore from its property, are ordinary dividends declared by its directors taxable as income without reference to how much of them is derived from capital and how much from profit in the strict sense of those terms? In the present case the complaint alleges that if the reasonable value of the ore in the mine, together with the cost of mining and marketing, is deducted from the amount received for the ore, there remains no profit or income from the business of the corporation, hence it is claimed the corporation is distributing only its capital among its stockholders in the form of dividends.

The subject of what constitutes income in the technical or true economic sense of the word is an interesting one, and also one upon which few economists and courts agree. Fortunately we are not called upon to enter that wide and somewhat vague field in the present inquiry. The word "income,"

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as used in the constitutional amendment and in the statute enacted in pursuance thereof, must be held to have been used in its common, ordinary meaning, and not in its strict, technical, or true economic sense. For it is a familiar rule of construction that ordinary words used in constitutions and statutes must be given their usual and common significance if such meaning harmonizes with the evident intent of the language employed and with the purpose to be accomplished. Ordinary dividends declared by going corporations, including mining corporations, are and always have, in the common acceptation of the term, been regarded as income, spoken of and understood to be such by people generally. It was therefore competent for the legislature to declare as income all dividends or profits derived from stock or from the purchase and sale of any property or other valuables acquired within three years previous.

To give the term "income" its technical meaning would not only violate the evident intent of the constitutional amendment and of the legislature, but it would practically render the Income Tax Act impossible of administration. The task of tracing dividends declared by all sorts of corporations to their source to determine how much came from capital and how much from income, strictly speaking, or how much from an enhancement of capital value, would be colossal in the amount of labor required, perplexing in character, and productive of almost endless litigation. No such construction should be given it unless absolutely demanded by the language of the act. On the contrary, its language requires that the word "income" be given its general and usual meaning. It follows that ordinary dividends declared by a going corporation, including mining corporations, will be conclusively presumed as against stockholders to be from earnings or profits for purposes of income taxation. Howes, Income & Principal, 18; Black, Income Taxes, sec. 41; *Comm. v. Ocean Oil Co.* 59 Pa. St. 61. This does not debar corporations from

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declaring dividends in cancellation of stock liability where they are in fact distributing capital. Whether such dividends are taxable need not now be decided. The dividends received by plaintiff from the Pewabic Company, which was engaged in mining and marketing iron ore, were properly taxed as income.

2. If dividends are taxable as income, can the stockholder, under sec. 1087*m*—4, sub. (a), (b), deduct therefrom the depreciation in the value of the stock caused by such distribution of dividends? Sub. (a) refers to the cost of carrying on the business from which the income is derived, and that is clearly not applicable. Sub. (b) provides for a deduction of losses during the year not compensated for by insurance or otherwise. In the first place, the distribution of dividends is not a loss within the meaning of the statute. In the second place, the book value of stock equals the value of the capital of the corporation plus the value of its undistributed surplus or profits. The depreciation in the book value of its stock is therefore in direct proportion to the distribution of surplus, and if that were allowed to be deducted there would be no income, for the book value of each share of stock before distribution exceeds its book value after distribution exactly by the amount distributed to it. No deductions can therefore be made.

3. Are dividends declared and distributed during 1911 by a going mining corporation out of surplus on hand prior to January 1, 1911, when the Income Tax Law went into effect, taxable as income for 1911? An affirmative answer must be given to this question, because the statute (sec. 1087*m*—1) provides that "there shall be assessed, levied, collected and paid a tax upon incomes received during the year ending December 31, 1911." The plaintiff received this income during 1911. It was immaterial when it was earned by the corporation. As a stockholder he acquired no right to it until it was distributed in the form of a dividend. The profits of a

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corporation become income to stockholders when distributed as dividends, but not before. *Miller v. Payne,* 150 Wis. 354, 136 N. W. 811; *Will of Pabst,* 146 Wis. 330, 131 N. W. 739; *Gibbons v. Mahon,* 136 U. S. 549, 10 Sup. Ct. 1057; *Hyatt v. Allen,* 56 N. Y. 553; *Minot v. Paine,* 99 Mass. 101.

4. The total net income of the Pewabic Company for 1911 was $109,332. Its total net income in Wisconsin was $7,853 or 7.184 per cent. of its entire net income. Plaintiff was allowed a deduction on his dividends of 7.184 per cent. This was correct. Sec. 1087*m*—4, sub. (c), must be construed as meaning a proportionate and not a total deduction of dividends when only a part of the income of a corporation is assessed in this state. Such must be held to be the legislative intent in order to do equity and avoid double taxation or no taxation. *State ex rel. M., St. P. & S. S. M. R. Co. v. Railroad Comm.* 137 Wis. 80, 85, 117 N. W. 846; *Second Ward Sav. Bank v. Leuch,* 155 Wis. 493, 144 N. W. 1119. That this is the correct construction is made clear by the amendment of 1913, which expressly so provides.

5. The dividends received from the Calumet & Arizona Mining Company were taxable for the same reason as were the Pewabic dividends. So were also the dividends received from the Superior & Pittsburg Copper Company. The fact that the latter company had distributed its stock in exchange for stock in the Calumet & Arizona Mining Company did not affect the character of the dividends declared by it after the exchange had taken place. The capital of the corporation passed by the exchange of stock, the surplus moneys or profits on hand were distributed in the form of dividends and taxable as such.

6. Prior to 1911 plaintiff purchased certain bonds for which he paid a premium and on which bonds he received interest during 1911. The right is claimed to annually deduct from the interest received a *pro rata* share of such pre-

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miums in order that capital may be kept unimpaired and that it be not taxed as income. Here again we meet the question of the technical and common meaning of "income." The statute provides that the term "income" shall include "all interest derived from money loaned or invested in notes, mortgages, bonds or other evidence of debt of any kind whatsoever." Sec. 1087*m*—2, sub. 2, (b). It takes no account of the profits of the investment, and contemplates no deduction from the amount of interest received based upon the purchase price of the security bought. It is a matter of common knowledge that stocks and bonds are constantly bought both above and below par. To make the deduction claimed either by way of amortization of premiums or by way of deduction under sec. 1087*m*—4, sub. (b), as a "loss actually sustained within the year and not compensated by insurance or otherwise," or under sec. 1087*m*—4, sub. (a), as a depreciation of the property from which the income is derived, would require the taxing officers to deal with the constantly fluctuating values of stocks, bonds, and other securities and determine such values from time to time. *Non constat* that plaintiff may not sell his bonds at a greater premium than he paid before they mature. If deductions were made when bought above par, additions should be made when purchased below par. Such a rule would be as burdensome in the administration of the law as tracing dividends to their source and was plainly not contemplated by the statute, which declares that all interest on bonds should be income.

7. For the year 1911 plaintiff paid a personal property tax of $3,292.26 and for the year 1912 he paid a personal property tax of $734.98. His income tax on his income for the year 1911 was $6,051.16. Against this he claimed the right to offset his personal property tax of $3,292.26 for the year 1911. This he was not allowed to do, but his personal property tax of $734.98 for the year 1912 was offset against his

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income tax for the year 1911. In refusing to offset plaintiff's personal property tax for 1911 against his income tax for that year the taxing officers erred. The statute provides:

"Any person who shall have paid a tax on his personal property during any year shall be permitted to present the receipt therefor to, and have the same accepted by, the tax collector to its full amount in payment of taxes due upon the income of such person during said year." Sec. 1087*m*—26.

Plaintiff's personal property tax of $3,292.26 was a tax on his personal property for and during the year 1911. His income tax of $6,051.16 was a tax on his income for 1911. The former tax may be offset against the latter. The payment of a personal property tax "during any year" is a payment of the tax for the year which the property is assessed, and payment due upon income *"during said year"* means the income tax for the same year. It is the year for which the taxes accrue and not the time of payment that is specified in the statute. Any other construction, were there room for construction, would lead to double taxation on much personal property for the year 1911. Both an income tax and a personal property tax would have to be paid on it. This the legislature provided against by allowing the latter to be offset against the former for that year as well as for subsequent years.

By the Court.—Order affirmed, and cause remanded for further proceedings in accordance with this opinion.

BARNES, J., dissents.

The appellant moved for a rehearing. In addition to briefs for the respective parties, a statement in support of the motion was submitted by the Wisconsin Tax Commission. The motion was granted October 6, 1914, and the cause was reargued on December 12, 1914.

For the appellant there was a brief by *Daniel W. Hoan*,

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city attorney, and *Max Schoetz, Jr.*, assistant city attorney, and oral argument by *Mr. Schoetz.*

Thos. E. Lyons, on behalf of the Wisconsin Tax Commission.

Geo. D. Van Dyke, respondent, *in pro. per.*

The following opinions were filed January 12, 1915:

VINJE, J. Upon the rehearing we have been favored with a brief in behalf of defendant and oral argument by its counsel and also by Mr. Lyons in behalf of the tax commission. The argument takes a threefold aspect. Statutory rules of construction permitting the one contended for by defendant are called to our attention. The construction given the statute by the tax commission is urged in its behalf, and an inconvenience in the administration of the law as construed by the court is alleged because the personal property tax and the income tax would appear upon different tax rolls.

No exception need be taken to the rules of statutory construction contended for. They are correct and useful where applicable. But when a statute, giving its language its ordinary and natural meaning, expresses a result neither absurd nor harsh, but on the contrary one in harmony with the general scheme of the law, namely, that an income tax shall, substantially, become a substitute for a personal property tax, then such natural and ordinary meaning should be given to the language used, and there is no room for construction. A tax was levied upon incomes for 1911. A tax upon personal property was levied for said year. The statute says that a person who has paid a tax upon his personal property during any year may have the same offset for the taxes due upon the income of such person during said year. Plaintiff paid a tax upon his personal property for 1911. He paid a tax upon his income during said year. The statute says the first may be applied in payment of the latter. Any other construction would lead to a double taxation of a vast amount of

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personal property in 1911, such as moneys, credits, stocks, and bonds which have since been exempted from taxation. No intent to impose a double tax thereon can be gathered from the statute. On the contrary it aims to avoid double taxation. Such was the construction given it in the *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, where it is said: "By the present law it is quite clear that personal property taxation for all practical purposes becomes a thing of the past." Page 505. It became a thing of the past from the time of the inception of the Income Tax Law and not from one year thereafter. As stated in the former opinion, it is the period of time for which each tax is paid that is made the basis of the right to offset, and not the time when the income tax becomes due.

The construction given laws by administrative departments is certainly entitled to weight—especially when long acquiesced in. But a practically contemporaneous construction of an administrative department cannot be successfully invoked to override a plain meaning of the statute. The inconvenience alluded to is more fanciful than real, as the tax receipt itself gives the right to offset, and that the taxpayer must produce. The conclusion reached in the former opinion is adhered to.

WINSLOW, C. J., and SIEBECKER, J., dissent.

BARNES, J. (*dissenting*). When this case was first decided I intended to state my reasons for dissenting, but pressure from other work was so great that I did not do so. I take this occasion to state my views.

I think the word "income" as used in the constitutional amendment and in the statute refers to net earnings or profits rather than to gross receipts, and that it does not include capital which is taxable under the uniformity rule. If a manufacturing company sells goods to the amount of $100,000

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in a year for cash, its gross receipts amount to this sum, but we do not ordinarily understand that this sum is income if it has cost the company $105,000 to manufacture and market the goods which produced the return. It will hardly do to say the illustration is not pat because no distribution is ordinarily made of gross receipts. If the money is not taxable as income in the hands of the corporation, I fail to see how it could become income in the hands of the stockholders by turning it over to them. If the property of a corporation consists of a building and the grounds on which it stands, that property represents the capital of the company regardless of the amount of outstanding stock. The stock simply evidences ownership of a fractional part of the capital and other assets of the company. Its actual value may differ widely from its face value. If the capital is converted to cash, the proceeds is still capital, and if the money is distributed among the stockholders it is a distribution of capital. The certificates of stock, which had a value before the distribution, cease to have any. They have simply been converted into another species of property. Now if the legislature can declare the dividend so received income, it may also declare that the proceeds derived by an individual from the sale of a farm or a house and lot or any other species of property is income. This would amount to a tax on transfers of property instead of a tax on profits. Income does not mean one thing where a corporation is involved and another where an individual is affected. A corporation the 1st of January in any year may own a large quantity of standing timber. It may cut $50,000 worth of such timber and make a profit of $10,000 on its operations over and above the value of the timber standing. According to the idea of the court, the entire $60,000 if distributed is income to the stockholder. I think only $10,000 is income, because that represents the profits made from capital. The removal of $50,000 worth of timber depreciated the capital of the corporation and the

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actual value of the outstanding stock to just that extent. The property of the stockholder has not been augmented by the transaction beyond his share of the profits actually made. The form only has been changed. Every dollar he receives in cash on a distribution of capital assets diminishes his investment in the corporation correspondingly. I confess I am unable to see any difference in principle between the distribution of capital assets among stockholders and the payment or partial payment of a note to an individual. If the payment on the principal is not income in the case of an individual, the capital of a corporation which may be distributed is not income. Neither do I see how it can be said that where a corporation has reduced part of its capital assets from one form to another the property acquired in the exchange is income where there is no increase in assets. If it is not income in the hands of the corporation, by what species of jugglery does it become such by transferring it to the stockholder? As to him the transaction amounts to taking wheat to the market and selling it and bringing home the money received. The ore in the Pewabic mine was a capital asset having a determinable tonnage value. Any profit made in the process of mining and marketing the ore was income. But I think the value of the ore in the mine was not income. The capital assets of the corporation were reduced to the extent of the value of that ore by taking it out. When the money received was distributed, the stockholders had money in lieu of an individed interest in a quantity of iron ore equal in value to the money received.

The statute, sec. 1087*m*—2, sub. 2, defines income as including *"all dividends"* or profits derived from stock. Whether where the property of a corporation is sold and distributed among the stockholders the capital so distributed can be correctly called a dividend, is not very material. The constitution allows a tax to be assessed on incomes. The word "income" must be taken in the sense in which it was gener-

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ally understood when the amendment was adopted, and the legislature cannot, under the guise of attempted definition, proceed to tax something as income which was not such in fact. *Income Tax Cases,* 148 Wis. 456, 512, 134 N. W. 673, 135 N. W. 164.

As I understand the opinion, it is conceded that if the technical meaning of the word "income" be taken, a distribution of capital assets does not constitute income. But it is said that the word should be given its "general and usual meaning," and that ordinary dividends of going corporations have, in the common acceptation of the term, been regarded as income whether declared from capital or profits.

It is true that the word "income" is sometimes used as meaning gross income or gross receipts instead of net receipts or profits. But I think it is ordinarily used and understood as being synonymous with gain or profit, and such is the meaning of the word as understood by economists who have written on income taxation and economics. Seligman, Income Tax, § 5; McCullough, Prin. of Pol. Econ. ch. 7, p. 530.

If the idea of the Income Tax Law as set forth in the *Income Tax Cases,* 148 Wis. 456, 505, 134 N. W. 673, 135 N. W. 164, be correct, the purpose was to distribute the burden according to ability to pay. There is no relation whatever between gross income and ability to pay. Imposing an income tax on gross income or receipts might be justified on the ground of overruling necessity if the state were in dire straits, but could be justified on no other ground. As a matter of fact the legislature has not pretended to tax gross income unless it has done so in the case of corporate dividends which are declared to distribute the capital of the corporation. Nearly all corporate dividends are declared to distribute profits or net earnings, and of course in such a case they are taxable. I cannot agree that the distribution of capital assets is generally regarded as income. Herein arises an interesting question. Can the gross income of one tax-

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payer be taxed and only the net income of another? The tax may be graduated and progressive, but does the rule of uniformity apply so that the legislature must tax either gross incomes or else net incomes? Art. VIII, sec. 1, of the constitution now provides:

"The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

In my view of the law a decision of the question is not essential to a decision of the present case. It may not be out of place to remark that in a brief recently filed in another case in this court, the attorney general has taken the position that the rule of uniformity applies to income taxes, except that they may be graduated and progressive.

Under none of the definitions of income could the money derived from the sale of ore be considered income while in the hands of the Pewabic Company, unless it can be said that the change of one form of corporate assets into another creates income. This does not seem reasonable. What is capital in the hands of the company does not become profit because the company distributes it among its owners.

I agree that the word "income" as used in the constitution should not be given a narrow or technical construction. I think, however, that it does not mean gross income or gross receipts, but does mean net income or profits. Unless it be given the first meaning, I do not see how the dividend received by the plaintiff in this case was taxable.

It is, of course, easier to tax gross income than it is to tax net receipts or profits, but this is hardly a substantial reason for saying that the legislature must have intended or was even authorized to tax the species of property which it is easiest to reach. It is much easier to ascertain the gross income of a mercantile or manufacturing company than it is the net income, but still only the net income is in fact taxed.

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SKULHUS, Plaintiff in error, vs. THE STATE, Defendant in error.

December 12, 1914—January 12, 1915.

Criminal law: Assault with intent to commit rape.

1. A person is not guilty of an assault with intent to commit rape unless, at the time he made the assault or at some time during its continuance, he purposed violating the woman forcibly and against her will. If he so purposed, it matters not that fear of detection and the consequences of his act, or the manner and degree of resistance, caused him to desist.
2. A purpose to overcome resistance is essential to the offense, but if the woman does not at any time consent it is not essential that she resist unto death, or continue her physical resistance in face of reasonably supposed imminent peril of great bodily harm, or controlling terror.
3. Although in this case the accused desisted from the assault as soon as outcry was made, a verdict finding him guilty of an assault with intent to commit rape was warranted by the evidence.

ERROR to review a judgment of the circuit court for Eau Claire county: E. RAY STEVENS, Judge. *Affirmed.*

Plaintiff was, in due form, convicted of the crime of assault with intent to commit the crime of rape. The alleged event occurred at Eau Claire, Wisconsin, in the daytime of August 13, 1913, and in the dining room of the woman's home. He was thirty-five years of age, a man of family, and a resident business man of Eleva, Wisconsin. She was a married woman twenty-two years of age, rather large and strong. The night before he lodged with a friend at a well known hotel in the city. In the morning he paid his bill and started out to make calls, ostensibly, for the purpose of soliciting enlistments in what he called his "Household Insurance Club." Somewhere around 10 o'clock in the forenoon he brought up at the house of a neighbor of the assaulted party, which he entered without leave, and commenced plying his ostensible trade. The lady of the house was alone. He represented himself as Dr. Nicolaysen and said he was connected with a

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firm of prominent doctors of the city. Without inducing the lady to join his club or being permitted to proceed far into the house or discuss his pretended business, he departed and soon called at the near-by house in question. He entered the house, without leave, and found the lady thereof apparently alone. He made known his pretended business, as before, and repeated his misrepresentations, adding that some 300 Eau Claire ladies were going into his scheme, that the neighbor first called upon had joined, and he had given her a thorough examination. In the meantime he satisfied himself by inquiries that the woman was, in fact, alone. The house was on a much traveled street, was near thereto, was with open doors, and but a few feet from the house he first entered. He suggested taking the woman's measurement, and such suggestion not being met with favor, followed it by declaring he would do so. Upon that he advanced towards her with a cord in his hands, grabbed her, attempted to take suggestive liberties with her person, commanded her to come into the bedroom, and forced her nine feet in that direction. They struggled some three minutes, resulting in his getting inside the bedroom and trying to pull her in. Thereupon, despairing of breaking his hold by pulling, or otherwise making him desist, she struck him and screamed. He did not desist immediately upon being struck but did and ran away when she screamed. In a few moments she went to the neighbor's house aforesaid and made complaint of the attempted violation of her person. The accused was an entire stranger to the woman and to people generally in the neighborhood. During the contest aforesaid neither the woman's hair nor her clothing was disarranged in any way nor, while the assault was in progress, did evidence of anything unusual occurring attract attention of neighbors or passers by, except the woman next door heard one shriek. Soon thereafter the assaulted called and appeared to be normal in every respect, except she was much agitated and crying. She said the ac-

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cused wanted to go into the bedroom with her and she struck him, and then he took his hat and went away and that was the last she saw of him.

After the accused was arrested he freely and correctly stated his residence, age, and business. He said he was accustomed to visit Eau Claire once in a while, and that he had no remembrance of having assaulted the woman. He denied the charge. The cause was submitted to the jury resulting in a verdict of guilty as charged, and judgment was rendered thereon.

For the plaintiff in error there was a brief by *Larson & Gilbertson* and *S. G. Gilman,* and oral argument by *J. C. Gilbertson.*

For the defendant in error there was a brief by the *Attorney General, J. E. Messerschmidt,* assistant attorney general, attorneys, and *Fred Arnold,* district attorney of Eau Claire county, of counsel, and oral argument by *Mr. Messerschmidt.*

MARSHALL, J. The jury and the trial judge saw the participants in the event which resulted in the accused being put upon his trial for the serious offense of which he was convicted. Seeing the person assaulted and hearing her testify, and observing the accused during the trial, though he did not testify, might properly have had a very efficient influence in producing the decision complained of. Presumptions in that regard are to be considered in support thereof, in addition to all reasonable inferences from the evidence, found in the record.

True, notwithstanding the conduct of the accused was highly reprehensible from any point of view, and he deserved severe punishment therefor, he did not commit the crime for which he was convicted, unless at the time he made the assault, or at some time during its continuance, he purposed, violating the woman, as charged, forcibly and against her will. If he did, it matters not, that fear of detection and the

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consequences of his act, or the manner and degree of resistance, caused him to desist. While in a case of this sort the conduct of the assaulted party as regards self-defense is very strict in favor of the idea that some offense, if any, less than the highest was attempted or perpetrated, it must not be lost sight of that it is consent by the assaulted party, however reluctantly given, and a purpose to secure consent, regardless of the means used to accomplish it, which robs the act of the vital element of the highest offense which can be committed upon womanhood,—not submission or purpose to secure submission. There may be, under some circumstances, the latter or a purpose of securing it, and utter absence of consent on the one side and determination to conquer the will as well as the body on the other, characterize the event.

The evidence in this case must be viewed in the light of the foregoing. Conditioned that there be no consent, a woman is not compelled, in her self-defense, to resist unto death, or continue to physically resist in face of reasonably supposed imminent peril of great bodily harm, or controlling terror,—to avoid being socially convicted, and open to be efficiently charged before the law, of being guilty of the highly immoral offense requiring only consent, though reluctantly given.

The maxim, "There is reason in all things" applies in this field as well as in any other, and enters into the rule stated with misleading omission of any explanation that resistance to the uttermost, both mental and physical, and executed purpose to overcome such resistance, is essential to the offense of rape, and assault with such purpose is essential to the necessary precedent offense.

Regardless of the moral aspects of the matter, there is no middle ground in the law between the highest offense upon woman, including the essential precedent offense, and that where both parties are to be treated as participants in violating the law and candidates for punishment by the law, and by social condemnation where the penalties to woman are

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quite as severe as those prescribed by statute. Therefore, while the duty of self-defense and the essentials of its efficient performance are very great, as has been stated, the dividing line being between consent and submission with criminal participation on one side and entire absence of it and abhorrence of the act by one party, on the other, the real fact of the matter is often one of extreme difficulty to determine, especially in a case where, as here, it is not claimed that the intended offense proceeded beyond a preliminary assault. The ultimate must be read out of inferences arising circumstantially. To do that is peculiarly a jury function. It would take an extreme case to impeach the result reached, especially when approved by the trial judge.

Where a jury faces a situation characterized by a hostile assault having been unquestionably committed, as in this case, and, especially, by an utter stranger of intelligence and middle age, upon a young married woman, alone and in the ordinary performance of her domestic duties, they cannot be expected to draw any very fine line in respect to whether the assaulter purposed forcibly conquering and securing submission or only of obtaining consent. To reason that, where a person circumstanced as the accused was, goes as far as he did, the probabilities are all in favor of the view that he intended full accomplishment, regardless of opposition, notwithstanding he was aroused to a full sense of his danger by an outcry liable to bring assistance to his victim, is logical and certainly permissible.

The conduct of the accused may well be viewed as conclusively negativing any purpose other than to have carnal knowledge of the body of the woman regardless of opposition from her. That he desisted as soon as an outcry was made, is evidentiary to the contrary, but not, necessarily, of sufficient weight to create a reasonable doubt as to what his real purpose was and that he was so recalled to the peril of his situation. It may be conceded that, for the time being, the

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accused was so mentally perverted and so controlled by his mere animal nature that he was deaf to the consequences of his act, unless he was actually insane, of which there is no proof; but that affords him no excuse.

We have thus written at considerable length because of the earnestness with which counsel contended that the circumstances characterizing the occurrence in question leave, so clearly, a reasonable doubt as to the purpose of the accused, that the jury was not warranted in finding him guilty of more than the offense of assault. We have purposed in deciding the case, to make such full response to such contention as to indicate that it has been carefully considered in all its aspects.

While the foregoing has been primarily addressed to the contention that there is no sound basis in the evidence for the verdict, it covers, sufficiently, all points suggested in respect to instructions and refusals to instruct.

By the Court.—The judgment is affirmed.

DALLMANN, Appellant, vs. DALLMANN, Respondent.

October 7, 1914—February 9, 1915.

Statutes: Construction: Repeal: Amendment: Retroactive effect: Divorce: Interlocutory judgment: Remarriage before final judgment: Validity.

1. A later statute which amends a former statute to read as in the later statute indicated continues in force all the provisions of the former statute found in the later one.
2. An amendatory statute will not be construed as retroactive or as applying to prior facts or transactions, or to pending proceedings, unless a contrary intention is expressly stated or necessarily implied.
3. An interlocutory judgment of divorce entered pursuant to ch. 323, Laws of 1909 (sec. 2360*k*), upon which final judgment could not

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be entered before the expiration of one year from its date, was not so affected by the subsequent enactment of ch. 239, Laws of 1911, that it thereby became a final decree; it being plainly the legislative intent that interlocutory judgments entered pursuant to the statute of 1909 must proceed to completion by final judgment under that statute. [Whether the legislature could make final a decree which was theretofore interlocutory only, is not decided.]

4. Nor was the restriction on remarriage contained in the act of 1909 (whereby it was made unlawful for any party to the action to marry again until the final judgment was entered) repealed or abrogated by the act of 1911, which forbade such remarriage until the end of one year from the final judgment.

5. When, therefore, a party to an action in which the interlocutory judgment of divorce was entered before the enactment of the statute of 1911, married again before entry of the final judgment, such marriage was unlawful and might be annulled under sub. (3), sec. 2351, Stats.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

James D. Foley, for the appellant.

For the respondent there was a brief by *Rubin & Zabel,* attorneys, and *Sol. J. Weil,* of counsel, and oral argument by *Mr. Weil.*

The following opinion was filed October 27, 1914:

TIMLIN, J. The plaintiff brought this action for annulment of a marriage alleged to have taken place on February 13, 1912, in the city of Milwaukee. The defendant had on August 6, 1903, married one William Vielbaum at Milwaukee, and on July 28, 1910, began an action for divorce against the latter, in which action an interlocutory judgment of divorce was entered on October 28, 1910, and a final judgment thereon on March 11, 1913. A demurrer to the complaint was sustained, and from that ruling the plaintiff appeals.

By sub. (3) of sec. 2351, Stats., it is ground for annulment of a marriage that at the time of contracting the marriage the man had a wife living or the woman had a husband

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living. Prior to the enactment of ch. 323, Laws of 1909, the subject of divorce was regulated by ch. 109, secs. 2348 to 2376, Stats. 1898, which with the annotations and court rules found in that edition of the statutes gives a very fair general idea of the divorce laws of this state as then in force. These last came to us in the infancy of our existence as a state from some of the older states and represented a vast amount of learning and experience on this subject, stretching back more than two centuries. Ch. 323, Laws of 1909, attempted extensive innovations in these laws and repealed secs. 2349, 2350, 2351, 2353, 2354, 2355, 2359, and 2360; amended to read as there set forth secs. 2330, 2362, 2366, 2370, 2371, and 2373; and added nineteen new sections numbered and designated according to the curious style then and now prevailing, secs. 2351, 2353, 2354, 2355, 2360, 2360*f*, 2360*g*, 2360*h*, 2360*h*—1, 2360*h*—2, 2360*h*—3, 2360*h*—4, 2360*i*, 2360*j*, 2360*k*, 2360*l*, 2360*n*, 2360*r*, 2360*s*. We are here concerned with sec. 2360*k*, which required, in all actions to affirm or annul a marriage, or for divorce, in which it was determined by verdict or findings that the marriage be annulled or the divorce granted, an interlocutory judgment which should fully determine the rights of the parties, provide for alimony and the maintenance of children, etc., and determine the status of the parties. But the determination of status *should not be effective, except for the purpose of an appeal to review the same, until after one year from the date when such interlocutory decree was entered.* One year was given from the date of the last revision or modification of such interlocutory judgment in which to appeal. At the expiration of one year from the entry or from the last modification or revision of such interlocutory judgment, if it had not been reversed or modified on appeal, and if the court on its own motion, or on motion of either party, had not ordered otherwise, final judgment might be entered on said interlocutory judgment, and this judgment so entered should be final, conclusive,

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and nonappealable, and subject to modification only with reference to alimony and the care and support of children.

Sub. 2 of said sec. 2330 read:

"It shall not be lawful for any person, who is a party to an action for divorce from the bonds of matrimony, in any court of this state, to marry again until the final judgment of divorce is entered; and the marriage of any such person solemnized before the entry of the final judgment of divorce shall be null and void."

By ch. 239, Laws of 1911, which went into effect June 5, 1911, secs. 2360*k*, 2360*l*, 2374, and sub. 3 of sec. 2330 of the said act of 1909 and sec. 3041 of the Statutes of 1898 were repealed.

Sub. 2 of sec. 2330 above quoted was amended to read:

"It shall not be lawful for any person, who is a party to an action for divorce from the bonds of matrimony, in any court in this state, to marry again until one year after judgment of divorce is entered, and the marriage of any such person solemnized before the expiration of one year from the date of the entry of judgment of divorce shall be null and void."

There was also by this act of 1911 added to the statutes two new sections numbered 2374 and 3041. The first of these provided that where a judgment of divorce from the bonds of matrimony is granted it shall not be effective, so far as it determines the status of the parties, except for the purpose of an appeal, for one year. During this year the court giving the same may vacate the judgment, which act shall restore the parties to their marital rights. The time of appeal from the judgment is limited to one year, from an order modifying or revising it to six months, and at the end of a year, no appeal having been taken and no modification or revision made, the judgment becomes final and conclusive without further proceedings. This act is in language and form of expression present and prospective and contains no retroactive words. It contains no saving or other clauses relating to

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pending cases. There is no express repeal of sub. 2 of sec. 2330, Laws of 1909, above quoted, but it is amended so as to read as above quoted.

Counsel for respondent, looking at the case from the viewpoint of defendant's interest and beginning with the act of 1911, has convinced himself and seeks to convince this court that the interlocutory judgment of October 28, 1910, was so affected by the statute which went into force on June 5, 1911, that the interlocutory decree became thereby a final decree; or the restriction on remarriage contained in the act of 1909 was thereby abrogated. In order to obtain a correct view of the question so presented we must approach it also from the viewpoint of public interest and from the right end and ascertain the conditions existing upon which the amendment or repeal of 1911 operated. The defendant was married to Vielbaum in 1903 and in consequence of this could not contract another valid marriage while he was living unless divorced from him. Sec. 2330, sub. 1; sec. 2351, sub. (3). These statutes were in force all the time from 1903 and are now in force. So one aspect of the question must be whether the defendant was divorced from Vielbaum at the time of her marriage to plaintiff. Manifestly she was not unless the interlocutory decree entered on October 28, 1910, had that effect. It did not purport to have that effect and was not so intended, and, if that effect be given it, it must be by force of what the legislature did in 1911.

Grouping cognate provisions we have:

"Such judgment shall also determine the status of the parties to such action, but such determination of the status of the parties shall not be effective, except for the purposes of an appeal to review the same, until after one year from the date when such interlocutory decree was entered." Sub. 2, sec. 2360*k* (ch. 323, Laws of 1909).

"At the expiration of one year from the entry . . . the final judgment may be entered. . . .

"It shall not be lawful for any person who is a party to an

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action for divorce . . . to marry again until the final judgment of divorce is entered." Sec. 2360*l* and sub. 2, sec. 2330.

It seems to be clear that under these statutes the defendant could only be relieved from the legal impediment created by her first marriage by a divorce which had the legal effect of removing the impediment. Such divorce she had not obtained at the time of the marriage in question. Under the law of 1909 a final judgment was required in order to have that effect. She would only be free to marry again after final judgment under that act. The statute of 1911 did not expressly purport to change the effect of this interlocutory decree or to make final what was theretofore interlocutory merely. Whether the legislature could do so is an interesting question not involved in this case.

We have in this state the usual constitutional division of governmental powers and in addition an express provision forbidding the legislature to grant divorces. Sec. 24, art. IV, Const.; *Wis. Tel. Co. v. Krueger,* 115 Wis. 150, 90 N. W. 458; *Sturgis v. Hull,* 48 Vt. 302; and Cooley, Const. Lim. (7th ed.) p. 127. That question does not arise here because the legislature has not attempted to make the interlocutory decree final. If any such effect could be given to the statute of 1911 it must be an incidental and unintended effect. Settled rules forbid giving to the language of amendatory statutes such effect. Authorities and cases *infra.* If, on the other hand, we seek to support the ruling below upon the argument that the legislative restriction against remarriage found in the statute of 1909 was repealed by the statute of 1911, we encounter insuperable difficulties.

In the first place, if such restriction were repealed this repeal would not alone give a right to marry to one who had a husband living from whom she was not divorced, because the statutes above referred to forbade such marriage. In the next place, the act of 1911 did not repeal the restriction contained in the act of 1909. It has long been the settled law

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of this state that a later statute which amends a former statute to read as in the later statute indicated continues in force all the provisions of the former statute found in the later statute. This as said, in *Julien v. Model B., L. & I. Asso.* 116 Wis. 79, 90, 92 N. W. 561, is common law although embodied, so far as relates to the revised statutes, in sec. 4985, Stats. 1898.

In Black on Interpretation of Laws (2d ed.) sec. 168, p. 579, the rule is stated as follows:

"Where an amendment is made by declaring that the original statute 'shall be amended so as to read as follows,' retaining part of the original statute and incorporating therein new provisions, the effect is not to repeal, and then re-enact, the part retained, but such part remains in force as from the time of the original enactment, while the new provisions become operative at the time the amendatory act goes into effect, and all such portions of the original statute as are omitted from the amendatory act are abrogated thereby and are thereafter no part of the statute."

From Id. sec. 170, p. 584, may also be quoted:

"An amendatory statute, like other legislative acts, takes effect only from its passage, and will not be construed as retroactive or as applying to prior facts or transactions, or to pending proceedings, unless a contrary intention is expressly stated or necessarily implied."

These rules are sustained by *Glentz v. State,* 38 Wis. 549, 554; *State v. Gumber,* 37 Wis. 298, 303; *Hurley v. Texas,* 20 Wis. 634; *State ex rel. Ohlenforst v. Beck,* 139 Wis. 37, 40, 119 N. W. 300; *Scheftels v. Tabert,* 46 Wis. 439, 446, 1 N. W. 156; *Laude v. C. & N. W. R. Co.* 33 Wis. 640, 643; *Fullerton v. Spring,* 3 Wis. 667.

Under these authorities it cannot be said that the act of 1911 operates as a repeal upon the restriction against remarriage found in the act of 1909. On the contrary it continues this restriction in force. It is true the restriction in the latter act runs from a different date or has a different beginning and termination, but the restriction is enacted in the same

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words, and there are no words of repeal and no indication that the legislature intended the law of 1911 should have any retroactive effect.

The defendant would only be free to marry again after final judgment, which could not be entered before the expiration of one year from the interlocutory judgment under the act of 1909; while under the act of 1911 she is only free to marry again at the end of one year from the final judgment. The complaint leaves her within the restriction of either statute. Neither of these things had occurred to remove the impediment of her former marriage at the time the marriage in question was contracted. One year had not elapsed from the time of the final decree and no final decree had been entered. If the act of 1911 could be taken to make the interlocutory decree final, still the marriage in question was contracted within one year from the time that act went into effect. In whatever way we look at this, the defendant was not divorced from her former husband at the time the marriage in question was contracted, nor was she within either statute at liberty to contract a valid marriage, but it appears quite plainly that the intention of the legislature was that the interlocutory judgments entered pursuant to the statute of 1909 must proceed to completion by final judgment under that statute. An exception cannot be made in favor of some particular judgment. No retroactive effect can be given to such a statute. *Ely v. Holton,* 15 N. Y. 595; 1 Lewis's Sutherland, Stat. Constr. (2d ed.) pp. 442, 443, and Wisconsin cases cited. They must all be affected alike, and the absence of retroactive words in the statute and the usual effect of continuing a part of a former statute in force by amending it with some additions or changes forbid any other construction of this act of 1911 so far as it relates to existing interlocutory judgments entered under the act of 1909.

By the Court.—The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.

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The respondent moved for a rehearing for the purpose of having the decision provide that no costs shall be taxed in this court against the respondent.

The motion was denied, with $25 costs, on February 9, 1915.

RELIANCE AUTO REPAIR COMPANY, Respondent, vs. NUGENT, Appellant.

October 27, 1914—February 9, 1915.

Constitutional law: Trial by jury: Milwaukee civil court: Appeal: Affirmance without new trial: Requiring jury fee: Change of venue: Rights of residents of other counties: Equal protection of the laws.

1. The jury trial guaranteed by sec. 5, art. I, Const., is the jury trial which existed in the territory at the time of the adoption of the constitution.
2. The jury trial provided for in the civil court of Milwaukee county (under ch. 549, Laws of 1909) satisfies the constitutional guaranty; and, as the guaranty contemplates but one jury trial, the provisions of law authorizing the affirmance of judgments of that court without new trial do not transgress the constitution.
3. The requirement that the party demanding a jury shall pay into court a jury fee of $12, to be recovered by him in the cost bill if successful in the action, is not an unreasonable regulation of the right, nor is it an invasion of sec. 9, art. I, Const., which provides that "every person . . . ought to obtain justice freely, and without being obliged to purchase it."

[4. Whether ch. 261, Laws of 1913,—providing that on any appeal from the civil court to the circuit court of Milwaukee county, where the defendant resides in another county he may have the place of trial changed to the circuit court of his own county and shall be entitled to a new trial in the same cases as in case of appeal from justice's court,—denies to defendants residing in Milwaukee county the equal protection of the laws, is not decided.]

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

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Plaintiff sued in the civil court of Milwaukee county to recover $93.35 for repairs upon and storage of defendant's automobile and recovered judgment therefor after a trial by the court, a jury trial having been waived.

The defendant appealed to the circuit court, where the judgment was affirmed upon the record notwithstanding the defendant's demand for a trial by jury. The defendant appeals from that judgment.

For the appellant there was a brief by *William J. Kershaw,* and oral argument by *Mr. Kershaw* and *Mr. R. I. Kenney.*

Michael Levin, for the respondent.

The following opinion was filed November 17, 1914:

WINSLOW, C. J. The defendant's chief contention is that under sec. 5 of art. I of the state constitution, which provides that "the right of trial by jury shall remain inviolate," he was entitled to a jury trial in the circuit court, and that so much of the Civil Court Act (ch. 549, Laws of 1909) as purports to authorize the circuit court on appeal to affirm or modify judgments of the first named court upon the record without a jury trial is unconstitutional.

The Civil Court Act provides (sec. 19, ch. 549, *supra*) that either party to a civil action in that court may demand and have a trial by a jury of twelve men, to be drawn from the jury list of the county, upon paying to the clerk of the court $12, which sum is to be recovered as costs if he prevails. As appears from the statement of facts, the appellant waived his right to this jury trial.

The following propositions are decided in this case:

1. The jury trial guaranteed by the constitution is the jury trial which existed in the territory at the time of the adoption of the constitution, *i. e.* a trial in a court of competent jurisdiction before a jury of twelve men impartially selected. *Norval v. Rice,* 2 Wis. 22; *Gaston v. Babcock,* 6 Wis. 503; *Klein v. Valerius,* 87 Wis. 54, 57 N. W. 1112.

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2. The jury trial provided for in the civil court of Milwaukee county satisfies this guaranty; and, as the guaranty only contemplates one jury trial, the provisions of law authorizing the affirmance of judgments of the civil court without new trial do not transgress the constitution in this regard.

3. The requirement that the party demanding a jury shall pay into court a jury fee of $12, to be recovered by him in the cost bill if successful in the action, is not an unreasonable regulation of the right, nor is it an invasion of sec. 9, art. I, of the constitution, which provides that "every person . . . ought to obtain justice freely, and without being obliged to purchase it." *Christianson v. Pioneer F. Co.* 101 Wis. 343, 77 N. W. 174, 917; *Harrigan v. Gilchrist,* 121 Wis. 127 (99 N. W. 909) at p. 215; *Conneau v. Geis,* 73 Cal. 176, 14 Pac. 580; *Adams v. Corriston,* 7 Minn. 456; *Adac v. Zangs,* 41 Iowa, 536; *Venine v. Archibald,* 3 Colo. 163; *State ex rel. Clark v. Neterer,* 33 Wash. 535, 74 Pac. 668; *Randall v. Kehlor,* 60 Me. 37. Furthermore, it appears that under the territorial statutes of Wisconsin any party recovering a verdict was required to pay into court for the benefit of the county $3 before the declaration of the verdict. Terr. Stats. 1839, p. 399, sec. 23. Under the Revised Statutes of 1849 and 1858, every plaintiff was required to pay into court for the use of the county $3 immediately after the swearing of the jury. R. S. 1849, ch. 131, sec. 28; R. S. 1858, ch. 133, sec. 33. Considering the greater purchasing power of money during those earlier years, this sum is not markedly greater than the sum now required to be advanced by the party demanding a jury. It is to be remembered also that under the present law the sum advanced is recovered as costs in case of success in the case.

4. It is unnecessary to pass upon the contention that ch. 261, Laws of 1913, amending the Civil Court Act, denies to defendants residing in Milwaukee county the equal protec-

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tion of the laws. By this act it is provided that in cases where the defendant resides in another county he may have the place of trial of the appeal changed to the circuit court of his own county and be entitled to a new trial in the same cases as in case of appeal from justice's court. If the objection were sound (a point concerning which we express no opinion), its only effect would be to condemn the amending law,—not the act which it attempts to amend.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $20 costs, on February 9, 1915.

Cox, Appellant, vs. Chicago, Milwaukee & St. Paul Railway Company, Respondent.

November 17, 1914—February 9, 1915.

Railroads: Injury to employee: Assumption of risk: Contributory negligence: Verdict construed: Evidence: Credibility.

1. In sec. 1816, Stats. 1911 (Laws of 1907, ch. 254), the term "contributory negligence" was used as including assumption of risk; and the defense of assumption of risk was not abolished by that statute.
2. In an action against a railway company under said statute for injuries to an employee, the jury found the plaintiff guilty of contributory negligence under a charge which required them to include assumption of risk as part of such negligence, and also found that such negligence was less as a contributing cause of the accident than the negligence of the defendant, thus finding the existence of all the conditions which entitled plaintiff to recover. *Held*, that a further separate finding of assumption of risk was merely a finding of one of the elements of the contributory negligence which they had already found, and did not affect the right of recovery.
3. Where plaintiff, a railway employee, was injured by being caught between the side of a tender and a stationary wooden structure

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standing so near the track that the clearance between it and the tender was only about seven inches, the fact that he could not give an exact or accurate account of just what happened at the time or just how his body was handled, did not render his version of the accident incredible.

APPEAL from a judgment of the county court of Winnebago county: FRED BEGLINGER, Judge. *Reversed.*

Personal injuries. Plaintiff was a fireman on a passenger engine, and was in some manner injured while attempting to get on his engine in the railroad yard at Janesville at about 6:45 o'clock a. m. September 26, 1911. Plaintiff claimed that the engine was standing at the coal shed and that just as he reached it the engineer moved it eastward and he (plaintiff) took hold of the grabirons on the tender and began to climb up and was caught between the side of the tender and the blowout box, a stationary wooden structure standing close to the track and used for blowing out the steam and water from engines. The testimony tended to show that this box was about three feet nine inches in height and that the clearance space between it and the tender was about seven inches. Plaintiff had worked in the yard more than a year and had seen and used the box many times. He claimed that there was much steam and smoke in the air which prevented him from seeing the box at the time.

The following special verdict was rendered:

"(1) Was the plaintiff caught between the blowout box in question and the tender of the locomotive and injured September 26, 1911? *A.* Yes.

"(2) If you answer the first question 'Yes,' then answer the following: Was the defendant, in maintaining said blowout box at its location at the time of said injury, guilty of a want of ordinary care and prudence? *A.* Yes.

"(3) If you answer the second question 'Yes,' then answer the following: Was the plaintiff at the time and place in question guilty of a want of ordinary care and prudence? *A.* Yes.

"(4) If you answer the second question 'Yes,' then answer

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the following: Did such want of ordinary care and prudence on the part of the defendant proximately contribute to plaintiff's injury? *A.* Yes.

"(5) If you answer the third question 'Yes,' then answer the following: Did such want of ordinary care and prudence on the part of the plaintiff proximately contribute to his injury? *A.* Yes.

"(6) Ought a person of ordinary intelligence and prudence and similarly situated, experienced and engaged, as was the plaintiff, to have known of the nearness of the blowout box with reference to engines passing upon said track, and comprehended the danger of contact with said blowout box resulting from riding upon engines with the body exposed beyond the line of the tender, in the vicinity of said blowout box? *A.* Yes.

"(7) If you find that the defendant and the plaintiff were each guilty of a want of ordinary care and prudence, was the fault of the defendant in that respect the greater? *A.* Yes.

"(8) If you answer questions Nos. 4, 5, and 7 'Yes,' then answer the following: Did the want of ordinary care and prudence on the part of the defendant contribute in greater degree to plaintiff's injury than the want of ordinary care and prudence on the part of the plaintiff? *A.* Yes.

"(9) If the court should be of the opinion that plaintiff is entitled to recover, at what sum do you assess his damages? *A.* $1,500."

Judgment being rendered for the defendant on the verdict, the plaintiff appeals.

For the appellant there was a brief by *Bouck & Hilton, E. J. Dempsey,* and *John F. Kluwin,* and a reply brief and oral argument by *Mr. Kluwin.*

For the respondent there was a brief by *C. H. Van Alstine* and *H. J. Killilea,* counsel, and oral argument by *Mr. Killilea.*

The following opinion was filed December 8, 1914:

WINSLOW, C. J. This accident happened in September, 1911, when sec. 1816, Stats., in substance provided that a

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railroad company should be liable in damages for injuries to its employees subject to the provisions thereinafter contained regarding contributory negligence, which provisions were in substance that, if the jury found the negligence of the company greater than the negligence of the injured employee and contributing in a greater degree to such injury, the plaintiff should be entitled to recover.

It was held by the trial court that this statute did not abolish the defense of assumption of risk, and we think this ruling was right. Prior to the passage of this statute this court had for years held that as between employer and employee assumption of risk was a form of contributory negligence. *Darcey v. Farmers' L. Co.* 87 Wis. 245, 58 N. W. 382; *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109, 74 N. W. 554. This court had also held (*Andrews v. C., M. & St. P. R. Co.* 96 Wis. 348, 71 N. W. 372) that under ch. 220, Laws of 1893, providing that railway companies should be liable to employees for all injuries resulting from certain named causes "without contributory negligence" on their part, the defense of assumption of risk still existed. This chapter so construed became sec. 1816 in the revision of the Statutes of 1898. It was slightly amended by ch. 448 of the Laws of 1903, and placed in the form in which it existed at the time of the accident in question by ch. 254, Laws of 1907. We discover no evidence of any intention to place any different meaning on the term "contributory negligence" in this latter chapter than that which had been placed upon it by the court in the original chapter which was thereby amended, and hence we conclude that the legislature used the term as including assumption of risk and did not abolish or intend to abolish it as a defense. The section was radically revised by ch. 644 of the Laws of 1913, but it does not appear that the changes made by this revision cast any light on the question here. The trial court, having concluded that the defense still existed, submitted a special question to the jury covering as-

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sumption of risk (question 6) in addition to the general question covering contributory negligence; and the jury having found assumption of risk to exist, the court defeated the plaintiff because of that fact, notwithstanding the jury had also found that the negligence of the defendant was greater and contributed in greater degree to the injury than that of the plaintiff.

If it appeared from the verdict, taken in connection with the charge of the court, that the jury in answering the questions as to the plaintiff's contributory negligence considered only acts of active negligence on his part as distinguished from that form of negligence included under the term "assumption of risk," the holding of the trial court would probably be justified, but on the contrary the exact opposite appears. The court charged the jury as follows with regard to question 3 of the verdict:

"In that connection you will bear in mind the definition and the meaning of the term 'ordinary care and prudence' as I have already defined it. If you find that any of the plaintiff's acts at the time in question in climbing upon and riding upon said engine were such that a man of ordinary care and prudence in such circumstances would have avoided and refrained from doing them, *or that at the time in question the plaintiff in the exercise of ordinary care and prudence knew or ought to have discovered the danger of so climbing and riding upon said engine, then you must answer the third question 'Yes.'* If you find that he did all that a person of ordinary care and prudence ought to have done under the circumstances, then you will answer the question 'No.'

"You will consider all the evidence and all the circumstances shown by the evidence bearing upon that question and then determine the fact as you may find it to be. You are further instructed that if the plaintiff failed in any degree, however slight, to exercise ordinary care and prudence under the situation, you must answer the third question 'Yes.' "

Under this charge it was the duty of the jury, if they were satisfied that the plaintiff knew or ought to have known of the

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danger of doing what he did, to have found him guilty of contributory negligence. This is nothing more nor less than assumption of risk, consequently it seems clear that the contributory negligence which the jury found in answer to questions 3 and 5, and which they found in answer to question 8, to be less in degree than the defendant's negligence, included all the elements of assumption of risk and the same elements which they found to exist in answer to question 6. In other words, the jury were twice asked to find on the question of assumption of risk and it must be assumed in all reason that they gave the same answer each time, *i. e.* that, when they said the plaintiff was guilty of contributory negligence, they included in their answer the same assumption of risk which they afterwards found in answer to the special question on that subject. Under the judge's charge they could do nothing else. While the judge's charge on assumption of risk, given in connection with the sixth question, was somewhat more elaborate and complete than the sentences quoted which were given in connection with the third question, it is clear that the essentials were all given in connection with both questions.

Question 6, therefore, practically drops out of the case. By their affirmative answer to it the jury simply found one of the elements of contributory negligence which they had already found in previous answers and which they measured up against the defendant's negligence in their answer to question 8.

The respondent contends that the plaintiff's version of the accident is incredible because he testified that he was rolled between the blowout box and the tender of the engine, a space of about seven inches. It is said that this could not happen without crushing the plaintiff's person to an extent far greater than was actually the case. There was evidence justifying the jury in finding, as they did, that the plaintiff was caught between the tender and the blowout box. If this was true,

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the fact that he could not give an exact or accurate account of just what happened at the time or just how his body was handled would not be surprising; in fact it would be surprising if he could do so.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the plaintiff on the verdict.

TIMLIN, J. I concur in the result only.

A motion for a rehearing was denied, with $20 costs, on February 9, and the following opinion was filed on February 26, 1915:

WINSLOW, C. J. It seems certain from the tenor of the brief filed in support of the motion for a rehearing that the opinion has not been understood. An opinion cannot always be expected to convince, but counsel are certainly entitled to ask that it be understandable. I freely take the blame for this situation and I shall now endeavor to briefly restate the position of the court in clearer terms.

1. When sec. 1816, Stats., was put in the form which it had at the time of the accident, assumption of risk was, under the decisions of this court, simply a form of contributory negligence. See decisions referred to in former opinion.

2. This being the case, the words "contributory negligence" in sec. 1816 included assumption of risk, and hence a plaintiff whose contributory negligence (*i. e.* active negligence combined with passive negligence or assumption of risk) was less as a contributing cause of the accident than the negligence of the defendant might still recover under the act.

3. In the present case the jury found the plaintiff guilty of contributory negligence under a charge which required them to include assumption of risk as a part of the negligence; they then found that the negligence so found was less as a contrib-

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uting cause than the negligence of the defendant. Thus all the conditions which under sec. 1816 entitled the plaintiff to recover were found to exist.

4. When the jury found, in answer to question 6, that the plaintiff ought to have known and comprehended the danger, they simply found that a certain part of the sum of contributory negligence which they had already found to exist consisted of that form thereof commonly known as assumption of risk; but inasmuch as they had already measured up the sum total of all forms of the plaintiff's contributory negligence and pronounced it less in amount than the defendant's negligence, this finding becomes of no moment.

Sec. 1816, *supra,* was amended by ch. 644, Laws of 1913, and seems now to differentiate between assumption of risk and contributory negligence. The question as to the effect of the amendments then made is not before us and we express no opinion on it.

BUR, Respondent, vs. BONG and another, Appellants.

November 17, 1914—February 9, 1915.

Mortgages: Foreclosure: Limitation of actions: Interest: Adverse possession by mortgagor or his grantee: Equity: Laches: Delay in enforcing mortgage.

1. A mortgage may be foreclosed although action on the note secured thereby is barred by limitation; and in such foreclosure action interest may be recovered on the principal sum if the mortgage and note provide for interest.
2. Possession of mortgaged premises by the mortgagor is presumed to be in subordination to the rights of the mortgagee, until it is shown to be in fact adverse; and this rule applies to a purchaser from the mortgagor, where the mortgage was duly recorded prior to the conveyance, although the purchaser had no actual notice thereof.
3. Possession does not become adverse in such a case without some distinct and positive act on the part of the occupant sufficient to

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bring to the mortgagee's notice the hostile character of the possession.

4. An action to foreclose a mortgage, like other equitable actions, is subject to be defeated by the equitable defense of laches; and even where the action is not barred by the statute of limitations relief may be denied, in case of unjustifiable delay, where enforcement of the mortgage would lead to unconscionable and inequitable results.

5. As between mortgagor and mortgagee in this case, the mere failure of the latter, for a period of nineteen years, to collect interest or take any steps to foreclose the mortgage security, was not such laches as should preclude enforcement of the mortgage.

6. But as against a grantee of a part of the mortgaged premises who paid full value therefor and afterwards made improvements without actual knowledge of the mortgage, although it was recorded, a delay by the mortgagee for nineteen years to assert any claim under the mortgage, resulting in an accumulation of interest exceeding the amount of the principal, and otherwise seriously prejudicing the grantee's interests, constituted such laches that the court should refuse to enforce the mortgage against the part so conveyed.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed as to one defendant; affirmed as to the other.*

Plaintiff brings this action to foreclose a mortgage and for the sale of the property mortgaged. In 1890 the defendant *Bong* was the owner of lot 14 and an undivided three-ninths of lots 15 and 16 in block 42 in the city of Green Bay. In 1891 he mortgaged his interest in this real estate to one Vroman. The remaining six-ninths of lots 15 and 16 were owned by the children of *Bong*. In 1892 *Bong* became possessed of the title to another one-ninth of lots 15 and 16, and on July 18, 1893, he executed a mortgage to the plaintiff on lot 14 and on the undivided four-ninths of lots 15 and 16. This mortgage was recorded. The notes given to evidence the original indebtedness, the last one due October 5, 1894, have long since become barred by the six-year statute of limitations. The court found that $750 of the principal, secured by the mortgage, remained unpaid; that no interest has ever

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been paid on the principal; and that there is now $926.73 due as interest. The court awarded judgment for the recovery of these sums and of foreclosure of the mortgage and sale of the premises embraced in the mortgage.

In 1894 Vroman foreclosed his mortgage on the three-ninths of lots 15 and 16 and received a deed therefor. In 1897 he conveyed his three-ninths in lot 15 to one Schauer by quitclaim deed and *Bong* conveyed to Schauer his undivided one-ninth and the five children conveyed to Schauer one-ninth each. By these conveyances he became owner of the entire nine-ninths of lot 15, but the one-ninth conveyed by *Bong* was subject to this mortgage of the plaintiff. None of these quitclaim deeds made any mention of the mortgage. In October, 1898, Schauer conveyed by warranty deed lot 15 to *Bertha M. Holland,* which deed was recorded the same day. She built a house on this lot and has remained in possession thereof ever since. The plaintiff's mortgage was executed and recorded in July, 1893. The defendant *Bertha M. Holland* has held possession of the premises since October, 1898, until the commencement of this action in January, 1913, and has paid the taxes. She had no actual knowledge of the existence of plaintiff's mortgage and has been in exclusive possession of the premises as owner of the land. The defendant *Bong* has been and now is the owner of the one-ninth of lot 16 mortgaged by him to the plaintiff, and has since acquired a larger interest therein.

Upon these facts, which were undisputed, the court held that the plaintiff was entitled to judgment of foreclosure and sale of the undivided interest in lots 15 and 16. From such judgment this appeal is taken.

The cause was submitted for the appellants on the brief of *J. H. M. Wigman,* and for the respondent on that of *Greene, Fairchild, North, Parker & McGillan.*

Counsel for the appellants cited, among other authorities, on the question of adverse possession, *Stevens v. Brooks,* 24

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Wis. 326, 329; *Sydnor v. Palmer,* 29 Wis. 226, 250; *Kelley v. McKeon,* 67 Wis. 561, 31 N. W. 324; *Ill. S. Co. v. Budzisz,* 139 Wis. 281, 329, 119 N. W. 935, 121 N. W. 362; *Dikeman v. Parrish,* 6 Pa. St. 210, 225; *Meyer v. Hope,* 101 Wis. 123, 126, 77 N. W. 720; *Bartlett v. Secor,* 56 Wis. 520, 14 N. W. 714; 2 Jones, Mortg. (6th ed.) § 1211. And upon the question of laches, Story, Eq. Jur. (13th ed.) § 1520; *Patterson v. Hewitt,* 195 U. S. 309, 25 Sup. Ct. 35; *Sheldon v. Rockwell,* 9 Wis. 166, 181; *Combs v. Scott,* 76 Wis. 662, 667, 45 N. W. 532; *Coon v. Seymour,* 71 Wis. 340, 37 N. W. 243; *Fisher v. Vaughn,* 75 Wis. 609, 44 N. W. 831, 833; *Kelly v. G. B., W. & St. P. R. Co.* 80 Wis. 328, 335, 50 N. W. 187.

Counsel for the respondent contended, *inter alia,* that the possession of a mortgagor, or any one claiming under him, must be deemed to be in subordination to the lien of the mortgage until proved to be adverse, citing many authorities. On the question of laches a distinction should be made between an action such as this, to enforce a statutory right, and a purely equitable action. *Calhoun v. Millard,* 121 N. Y. 69, 82, 24 N. E. 27; *Burns v. Cooper,* 140 Fed. 273; *Richey v. Sinclair,* 167 Ill. 184, 47 N. E. 364; *Newton v. Evers,* 77 Misc. 619, 137 N. Y. Supp. 507. Mere lapse of time, short of the statutory period of limitation, is insufficient to constitute laches. *Hartstein v. Hartstein,* 74 Wis. 1, 41 N. W. 721; *Ellis v. Southwestern L. Co.* 102 Wis. 400, 78 N. W. 747; *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571; *Demuth v. Old Town Bank,* 85 Md. 315, 37 Atl. 266; *Swatts v. Bowen,* 141 Ind. 322, 40 N. E. 1057; *Sprague v. Lovett,* 20 S. Dak. 328, 106 N. W. 134; *Shelden v. Warner,* 45 Mich. 638, 8 N. W. 529.

The following opinion was filed January 12, 1915:

SIEBECKER, J. The plaintiff's right to foreclose his mortgage, although the note secured by the mortgage is barred by

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the statute of limitations, has been well established by the decisions of this court. *Wiswell v. Baxter,* 20 Wis. 680; *Knox v. Galligan,* 21 Wis. 470; *Phelan v. Fitzpatrick,* 84 Wis. 240, 54 N. W. 614; *Duecker v. Goeres,* 104 Wis. 29, 80 N. W. 91. The mortgagee under such circumstances is also entitled to recover interest on the principal sum if the note and mortgage provide for the payment of interest. *Wiswell v. Baxter, supra.*

The defendants contend that the plaintiff has lost his interest and rights to their property by reason of their adverse possession of the premises as against him and all others claiming any interest therein. There is no dispute but that plaintiff obtained a valid mortgage covering an undivided one-ninth interest in lots 15 and 16 on July 18, 1893, which mortgage was duly recorded and remains unsatisfied of record to the present time. The mortgagor, *Bong,* defaulted in the payment of the sum of $750 of the original indebtedness and of the interest which accrued on the entire principal after the same became due, which the court found now amounts to $926.73. The circuit court found that there is due the plaintiff from the defendant *Bong* these sums, amounting to $1,676.63, and that plaintiff's rights under these mortgages have not been cut off by adverse possession of the premises on the part of *Bong* or *Bertha M. Holland.* The general rule is that possession of the premises by the mortgagor is presumed to be in subordination to the rights and interests of the mortgagee or purchaser under foreclosure sale until it is shown that such possession was in fact adverse to the rights and interests of the mortgagee in the premises. *Avery v. Judd,* 21 Wis. 262; *Wright v. Sperry,* 25 Wis. 617; *Seeley v. Manning,* 37 Wis. 574.

The mortgage being duly recorded when *Bong* deeded his interest in lot 15 to Schauer and he to defendant *Holland,* it requires some distinct act of denial on their part, of being in possession in subordination to plaintiff's rights, to terminate

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the acknowledged relation existing between the plaintiff as mortgagee and the mortgagor, *Bong,* and those holding under him to set adverse possession running. The record of the mortgage is constructive notice to all subsequent purchasers of the mortgagee's rights in the premises. Under such circumstances the mortgagor and those holding under him continue to hold in subordination to the mortgagee's rights, unless it be shown that their possession was in fact inconsistent with and adverse to the rights of the mortgagee. *Maxwell v. Hartmann,* 50 Wis. 660, 8 N. W. 103; *Neilson v. Grignon,* 85 Wis. 550, 55 N. W. 890; *Erwin v. Lewis,* 32 Wis. 276. The evidence fails to show any facts, aside from plaintiff's long delay in enforcing his claim, which tend to show that the defendants had entered into the possession of the premises and occupied them inconsistent with and adverse to the rights of the plaintiff as mortgagee under his recorded mortgage. Their possession could not, under the circumstances, become adverse except by positive and direct acts on their part sufficient to convey and bring to plaintiff's notice their hostile possession as to him. This, as the court found, is not established by the evidence, and therefore the claim that plaintiff lost his rights under the mortgage upon this ground must fail.

It is contended that the plaintiff by his laches is precluded from enforcing the mortgage. In the case of *Rogers v. Van Nortwick,* 87 Wis. 414, 58 N. W. 757, this court declared that:

"A court of equity applies the rule of laches according to its own ideas of right and justice, and the courts have never prescribed any specific period applicable to every case, like the statute of limitations; and what constitutes a reasonable time within which the suit must be brought depends upon the facts and circumstances of each particular case."

The court also there quotes approvingly the following:

"No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of con-

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science, good faith, and reasonable diligence, and will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred."

In the recent case of *Likens v. Likens,* 136 Wis. 321, 117 N. W. 799, this court, referring to the nature and application of this defense, stated:

"The defense of laches does not depend upon any statute of limitation, but is in the nature of an equitable estoppel, and operates as a bar upon the right to maintain an action by those who unduly slumber upon their rights. There is no fixed rule as to the lapse of time necessary to bar a suitor in a court of equity. Each case must stand upon its own particular facts. Great lapse of time, if reasonably excused and without damage to the defendant, has been ignored; while slight delay, accompanied by circumstances of negligence, apparent acquiescence, or change of defendant's position, has been held sufficient."

Other cases in this court wherein the doctrine was involved and applied or rejected according to justice and right, under the facts and the circumstances of the case, are: *Kropp v. Kropp,* 97 Wis. 137, 72 N. W. 381; *Cross v. Bowker,* 102 Wis. 497, 78 N. W. 564; *McCann v. Welch,* 106 Wis. 142, 81 N. W. 996; *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571; *Foote v. Harrison,* 137 Wis. 588, 119 N. W. 291; *Russell v. Fish,* 149 Wis. 122, 135 N. W. 531.

As respondent asserts, the fact that the statute of limitations has run against the debt evidenced by the notes is not a bar to an equitable action for enforcing the mortgage lien against the property; the plaintiff has the right to enforce it any time within twenty years. The action is equitable in its nature and, like all rights sought to be enforced in our courts, it is subject to be defeated by the equitable defense of laches, as recognized in the law. This question arose in *McCann v. Welch, supra,* and the court there, speaking through Justice

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DODGE, said: "Courts of equity, however, are not dependent on statutes of limitation for their right to deny hearing to those who unduly have slumbered on their rights." While express limitation statutes have somewhat modified the position of courts in equitable actions, nevertheless exercise of its judgment to deny relief in cases of unjustifiable delay to enforce a right is not taken away by such statutes. The reason sustaining the doctrine is that justice and right may require that a party be denied the use of the courts because he has negligently slept on his rights, thereby inducing a feeling of security in others that no adverse claim exists, and that enforcement thereof under the circumstances leads to unconscionable and inequitable results between the parties to the transaction. Mere delay within the statutory period of limitation is not in itself considered sufficient to bar the enforcement of a right, but if gross neglect has operated to lead the other party into a position where enforcement of the asserted right would operate to prejudice the other's beneficial interests, then equity charges the result to the negligent party and precludes him from asserting his right by refusing him the use of the courts to enforce it. The fact that plaintiff's right arises out of a money demand and a mortgage which was given to secure it, and duly recorded, does not exempt him from the operation of such defense if under the facts and circumstances his conduct and long delay in asserting such right is without reasonable explanation and he apparently acquiesced in the belief that no rights would be asserted under the mortgage, and such delay misled defendants to their prejudice, so that an enforcement of the mortgage would lead to unconscionable and inequitable results between the parties.

The evidence in the case showing the relationship of the parties and their conduct in dealing with the matters in issue is not voluminous and clearly shows the facts surrounding the transaction and the relationship of the parties. It appears that the defendant *Bong*, the mortgagor, defaulted in his pay-

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ment of $750 of the principal sum due on the notes evidencing his indebtedness to the plaintiff and that he at no time paid any interest due on the principal of the debt, which had been due over eighteen years, and that the interest due at the time of the trial, part of which had been due over nineteen years, amounted to $926.73. As between the plaintiff, the mortgagee, and the defendant *Bong,* the mortgagor, the facts show nothing out of the usual relationship that exists between debtor and creditor aside from plaintiff's delay in taking any steps to collect any interest whatsoever for this period of over nineteen years, nor had he taken any steps for eighteen years and over to collect the balance of $750 of the principal debt. Plaintiff's explanation is that he is related to the defendant *Bong* and that he did not desire to press him for payment and believed *Bong* would pay some time. While this conduct is most extraordinary and does not readily harmonize with the idea that plaintiff regarded the claim against *Bong* as a subsisting one, yet there is nothing showing that this extraordinary delay in any way misled *Bong* to his prejudice. *Bong* knew that he owed the debt and that he was primarily liable therefor. It was his legal duty to take affirmative steps to pay the debt and he cannot, therefore, complain of plaintiff's neglect to take any steps to enforce the mortgage security, nor can he, under the facts and circumstances, justifiably claim that such neglect of plaintiff misled him in the matter to his prejudice.

The facts and the circumstances of the case showing the relationship of plaintiff and the defendant *Mrs. Holland* present a totally different situation. As above stated, the mortgage securing this debt embraces a one-ninth interest in lot 15, owned by *Mrs. Holland* since 1898. The recording of this mortgage operated to give *Mrs. Holland* constructive notice of its existence, though it appears she had no actual knowledge thereof until July, 1912. It must be assumed, then, that the plaintiff had the right to treat *Mrs. Holland* as

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one having notice of the existence of the mortgage. The question then is, Do the facts show that plaintiff was guilty of laches in enforcing his rights under the mortgage against *Mrs. Holland,* as owner of lot 15, under the deed from Schauer in 1898? Schauer had purchased *Bong's* interest in this lot in 1897. There is nothing showing that these assigns of *Bong* agreed to pay the debt to the plaintiff, secured by the mortgage, or that they did not by reason thereof pay the full amount of the purchase price. This left *Bong* primarily liable for the debt to plaintiff and charged the plaintiff with the active duty of collecting it from *Bong,* who occupies the adjoining lot 16, one ninth of which is also embraced in this mortgage. Under these facts and circumstances *Mrs. Holland* owed no duty to plaintiff to pay the debt unless *Bong,* who was primarily liable, defaulted. These existing conditions and relations between the parties entitled her to rely upon the assumption, in view of the long delay, that plaintiff had been paid by *Bong* and that in case of *Bong's* default that plaintiff would have notified her within a reasonable time and have asserted his claim under his mortgage against her lot. This the plaintiff wholly neglected to do for upwards of eighteen years after the $750, unpaid balance of the debt, became due and after a continuous default in paying any interest for a period over nineteen years. The plaintiff's neglect to enforce payment of these demands against *Bong* and his failure to assert any right to *Mrs. Holland's* property, in effect amounted to an acquiescence by silence that no claim was existent against her property and furnished a substantial and good ground to induce a feeling of security on her part that this claim against her property had been fully discharged by *Bong* and that it was no longer existent. Plaintiff's long and unreasonable delay in failing to proceed against *Mrs. Holland* on *Bong's* default seriously prejudiced her interest, in that it caused her to change her situation and relationship in the matter in very substantial ways to her injury,

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if the mortgage be now enforced, through the cost of improvements, which she could have avoided had she been informed of *Bong's* default, and by subjecting her property to the payment of an amount of interest on the debt in excess of the unpaid principal, which accumulated in the main after the notes given had become outlawed. We consider that the plaintiff was clearly guilty of laches as to *Mrs. Holland* and that an enforcement of his mortgage against her interest in lot 15 would lead to unconscionable and inequitable results as to her, and must therefore deny him the relief awarded by the circuit court granting a foreclosure and sale of *Mrs. Holland's* interest in lot 15.

By the Court.—The judgment appealed from is reversed as to the defendant *Mrs. Holland,* and the cause remanded with directions to award judgment dismissing plaintiff's complaint as to *Mrs. Holland;* and the judgment is affirmed as to the defendant *Bong.*

WINSLOW, C. J., and VINJE, J., dissent.

A motion for a rehearing was denied, with $25 costs, on February 9, 1915.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent, vs. MENASHA PAPER COMPANY, Appellant.

November 19, 1914—February 9, 1915.

Carriers: Demurrage charges: Rules construed: When sidetrack is "full:" Placing cars: Holding at destination awaiting orders: Embargo: Illegality: Removal without notice.

1. Within the meaning of a rule relating to car service and demurrage charges, a private sidetrack was "full" when, although it would hold more, as many cars were upon it as could be handled and unloaded thereon.

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2. An embargo by which a railway company, at the request of a manufacturer and not by reason of any conditions on its lines necessitating it, refused to furnish cars for shipments to such manufacturer, was illegal under the statutes which provide against discrimination or special privilege; and, in the absence of any agreement that notice should be given of its removal, no duty rested upon the railway company to notify the manufacturer before raising such embargo.

3. Under rules providing for demurrage charges on cars for unloading after expiration of a certain "free time" following the notice of arrival or placing; that such cars shall be considered placed when they are held awaiting orders from consignees; and that the delivery of cars to a private track shall be considered to have been made when such cars have been placed on the track designated or, if such track be full, when the delivery would have been made had the condition of such track permitted, demurrage charges were proper upon cars which, after notice to the consignee of their arrival, were held beyond the free time, awaiting orders, because of congestion on the private sidetrack of the consignee, although after reaching their destination such cars had been carried to the nearest siding and there held until an accumulation in the yards ceased, it appearing that the consignee's private track was kept full and that there was no delay in switching the cars upon such track when the consignee so requested.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This action was brought to recover for alleged demurrage charges on cars of logs and bolts shipped to appellant at Menasha, Wisconsin, in June and July, 1908. Two causes of action are set out in the complaint; the first for demurrage accruing on intrastate shipments, and the second for demurrage accruing on interstate shipments. The case was referred to John F. Harper, Esq., referee, to hear, try, and determine, who made the following findings of fact and conclusions of law:

"Findings of fact.

"1. That the plaintiff was, at all times mentioned in the complaint, a railroad corporation engaged in operating a railroad at Menasha, Wisconsin, and elsewhere, and that the de-

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fendant was at such times, also a corporation engaged in business at Menasha, Wisconsin, and having its place of business adjoining the railroad of the plaintiff.

"2. That the defendant during the times in question maintained and operated, for the purposes of unloading the cars delivered by the plaintiff, a private sidetrack, which connected with the tracks of the plaintiff.

"3. That on and between the 3d day of June, 1908, and the 20th day of July, 1908, the plaintiff carried and delivered in intrastate commerce certain cars, containing pulp and wooden bolts and logs, as more particularly set forth in Exhibit B, attached to the complaint; that the numbers of said cars, the dates and hours of their arrival at Menasha, Wisconsin, the dates and hours when the same were ordered by the defendant placed upon its sidetrack, the dates and hours when they were respectively placed upon its sidetrack for unloading, and the dates and hours when they were respectively released, are all correctly set forth in Exhibit B attached to the complaint.

"4. That on and between the 6th day of June and the 24th day of June, 1912, the plaintiff carried and delivered in interstate commerce certain cars containing logs and wooden bolts, more particularly set forth in Exhibit C, attached to the complaint; that the numbers of said cars, the dates and hours of their arrivals at Menasha, Wisconsin, the dates and hours when the same were ordered by the defendant placed upon its sidetrack, the dates and hours when they were respectively placed upon its sidetrack for unloading, and the dates and hours when they were respectively released, are all correctly set forth in Exhibit C, attached to the complaint.

"5. That the defendant's sidetrack, from which the cars were unloaded by the defendant, could accommodate about seven cars, but had an actual capacity, as used during the times in question, of three or four cars, or possibly five; that as defendant used the sidetrack, more cars could not have been placed upon it and unloaded than were actually placed upon it and unloaded there during the times in question, to wit, about two or three cars a day.

"6. That each and every of the cars in question was held at destination on account of congestion of defendant's private sidetrack, due to its inability to unload and awaiting orders from defendant.

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"7. That when each of the cars in question arrived the plaintiff notified the defendant of each arrival by telephone, giving the car numbers, and, according to the general custom, with only occasional exceptions, the plaintiff held the cars until defendant notified it to place them upon the sidetrack for unloading.

"8. That defendant did not order the cars placed for unloading sooner than as shown in Exhibits B and C, attached to the complaint, because, practically, defendant could not handle any more cars than it did, and hence did not ask for them.

"9. That no request or demand was ever made by order to spot cars or otherwise that plaintiff spot cars for unloading on any public delivery track or any place other than defendant's said private sidetrack, and that defendant would have been at all times unable to unload said cars had they been so spotted.

"10. That there was no delay on the part of the plaintiff in switching the cars upon the sidetrack, or refusal or inability of the plaintiff to place the cars, nor any insufficiency of terminal facilities, nor any congestion in the yards of the plaintiff which prevented the placing of cars upon the sidetrack in question when ordered.

"11. That the charges for demurrage in question should be computed according to the rules of the Wisconsin Car Service Association, shown as Exhibit A in plaintiff's complaint.

"12. That the schedules attached to the complaint, Exhibit A, were tariffs for computing demurrage charges, duly prepared, printed, posted and filed with the Railroad Commission of Wisconsin and the Interstate Commerce Commission.

"13. That none of the cars on which demurrage accrued were through consignments not held for orders.

"14. That the demurrage sued for accrued at destination.

"15. That there is due to the plaintiff from the defendant for demurrage upon the cars mentioned in Exhibit B attached to the complaint, the amounts therein set forth, aggregating $104, from which there should be allowed deductions, as set forth in said Exhibit B, computed according to the Car Service Rules, amounting to $70, leaving a new balance of $34 to the plaintiff under Exhibit B.

"16. That there is due to the plaintiff from the defendant

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for demurrage upon the cars mentioned in Exhibit C attached to the complaint, the amounts therein set forth, aggregating $1,419, from which there should be allowed deductions as set forth in said Exhibit C, computed according to the Car Service Rules, amounting to $435, leaving a new balance of $984 to the plaintiff under Exhibit C.

"17. That on March 14, 1908, the plaintiff, at the request of the defendant, and not by reason of any conditions on its line necessitating such notice, notified the plaintiff's agents in Wisconsin and Michigan, 'until further advised,' to discontinue to furnish equipment to load with bolts for the defendant; that this arrangement, called an 'embargo,' did not run out until the close of the year 1908; that this 'embargo' did not by its terms cover logs and was not thereafter modified by an agreement of the parties to cover logs; that in April and May, 1908, the said limited number of cars from certain shippers were forwarded by the plaintiff to the defendant upon defendant's request, but that such cars were not included among those set forth in Exhibits B and C, attached to the complaint; that after shipment of these cars, the 'embargo' was applied again, so that it was the agreement between the plaintiff and the defendant not to ship any bolts to plaintiff, but this agreement was violated, and the cars mentioned in Exhibits B and C were shipped in violation thereof, and were shipped without notice from the plaintiff to the defendant of intention to ship the same, resulting in the arrival of cars in great numbers on certain days, as more particularly set forth in the exhibits attached to the complaint, and as result of the violation of the embargo agreement as to bolts, hereinbefore found.

"18. That in July 20, 1908, and again in September, 1911, plaintiff duly demanded of defendant payment of the demurrage set forth in the complaint; that defendant refused and assigned as its sole ground for refusing to pay, the existence of the said embargo order.

"Conclusions of law.

"1. That plaintiff is entitled to recover of the defendant the sum of $34 for the demurrage set forth in Exhibit B attached to its complaint, and the further sum of $984 for the demurrage set forth in Exhibit C, attached to its complaint, making in all a total of $1,018, together with interest thereon from July 20, 1908.

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"2. That defendant is estopped from urging any defense other than the existence of the said embargo.

"3. That the embargo arrangement found in finding 17 was and is illegal, contrary to public policy, and void."

The report of the referee was confirmed by the court and judgment entered accordingly for plaintiff, from which this appeal was taken.

For the appellant there was a brief by *Silas H. Bullard* and *Felix J. Streyckmans,* and oral argument by *Mr. Streyckmans.*

For the respondent there was a brief by *Lines, Spooner, Ellis & Quarles,* and oral argument by *Louis Quarles.*

The following opinion was filed December 8, 1914:

KERWIN, J. The findings of the learned referee, confirmed by the court and sustained by the evidence, support the judgment. The appellant contends that section C, rule 5, hereafter quoted, is controlling. Under this rule it is insisted that it was the duty of respondent to keep the track of appellant full and that it would accommodate seven cars, and that only three or four, and never to exceed five, cars were kept thereon, hence no demurrage could have been charged under the rule referred to. We are of opinion that the referee properly construed the rule as applied to the facts in this case in holding that the track was full to its capacity when demurrage was charged. The rule must have a reasonable construction; and it appears from the evidence that while seven cars could be placed upon the track at one time, not to exceed five could be placed there so as to make its use for unloading practicable, and this situation was well understood by the parties and cars placed as required accordingly. So it is clear that the track was kept full within the meaning of the rule.

In the instant case the cars held and upon which demurrage was charged reached destination at Menasha and were held at Snells siding for convenience awaiting orders, and the appellant ordered only so many cars as it could unload from day

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to day. It appears that the appellant did not order any more cars placed on its track than were placed thereon, but it is claimed that it was the duty of respondent to place and keep the track full with seven cars whether such condition interfered with unloading or not, and if the track was not kept full no demurrage could be charged.

The construction placed upon the rule by both parties, viz. that the track was full when the number of cars which could be handled there were upon it, was the sensible and practical construction. The respondent was not obliged to do a vain and useless thing by putting seven cars upon the track at one time and thus prevent the practical handling or unloading of any cars thereon by appellant contrary to its orders. The referee and court below found upon sufficient evidence that while the appellant's sidetrack from which cars were unloaded could accommodate about seven cars, it had an actual capacity as used during the time in question of only three or four cars, or possibly five; that as defendant used the sidetrack more cars could not have been placed upon it and unloaded than were actually placed upon it and unloaded during the time in question, to wit, about two or three cars a day.

Appellant complains of a so-called raising of an alleged embargo without notice. The court below and the referee held the embargo illegal, against public policy, and void. It appears from the evidence that appellant demanded of respondent that it issue an embargo refusing to give to shippers cars for bolts consigned to appellant at Menasha and respondent did so. The order reads as follows: "On account of accumulation, you will, until further advised, discontinue to furnish equipment to load with bolts consigned to *Menasha Paper Company.* Please be governed accordingly." It is clear that the so-called embargo as laid and operated by direction of appellant granted special privileges and was contrary to law, therefore was raised by the respondent so as to avoid liability for discrimination as between shippers. Both the federal law and the state statutes provide against discrimination or

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special privileges; and the so-called embargo in question was in contravention of law. *Chicago & A. R. Co. v. Kirby,* 225 U. S. 155, 32 Sup. Ct. 648; *St. Louis, I. M. & S. R. Co. v. Edwards,* 227 U. S. 265, 33 Sup. Ct. 262; *Michie v. N. Y., N. H. & H. R. Co.* 151 Fed. 694; *U. S. v. P. & R. R. Co.* 184 Fed. 543; *Blinn L. Co. v. S. P. R. Co.* 18 Int. Comm. Comm. Rep. 430; *Armour P. Co. v. U. S.* 209 U. S. 56, 28 Sup. Ct. 428; *Chicago, R. I. & P. R. Co. v. Hardwick F. E. Co.* 226 U. S. 426, 33 Sup. Ct. 174; Hepburn Act of June 29, 1906 (34 U. S. Stats. at Large, 584, ch. 3591); secs. 1797—4, 1797—10, 1797—22, 1797—24, Wis. Stats.

It is claimed by appellant that because some of the cars, after reaching destination at Menasha, were carried beyond to the nearest sidetrack and there held until the accumulation in the yards ceased, then moved back to Menasha, the cars were not held at destination, hence no demurrage could be charged, and rests on *U. S. v. D. & R. G. R. Co.* 18 Int. Comm. Comm. Rep. 7, in support of this position. That case is not controlling here. An examination of it will show that the commission in treating the case found no rule similar to rules of the respondent which control the instant case, copies of which are attached to the complaint, and the case relied upon by appellant is based upon a rule in force at the time the demurrage accrued, therefore governed the case. But afterwards provision was made for a case similar to the one before the commission and which was in force when the case above referred to was tried, but not applicable because the demurrage accrued before such rule went into effect. In referring to this subject in *U. S. v. D. & R. G. R. Co., supra,* the commission said, page 10:

"If the provisions subsequently inserted and now appearing in defendant's tariff had been in force at the time, demurrage would have accrued on cars held at Thistle Junction by direction of complainant. We rest our decision of this case on the proposition that demurrage can be assessed only in accordance with tariff provisions, and that the rules of the Utah Car

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Service Association in effect when these cars were delivered did not authorize the demurrage charges in question."

In the case at bar the cars reached destination and notice of their arrival was given by respondent and the cars were thereafter held awaiting orders. The rules in force at the time in question clearly cover the instant case and justify the demurrage charges on any theory of the case.

"Rule 4. Cars which are stopped in transit or held by orders of shippers or consignee for reconsignment to points beyond, for change of load, for amended instructions, for change in billing, milling, shelling, cleaning, etc., or on account of improper, unsafe or excessive loading, or for any other reason for which the shipper or consignee is responsible, shall be subject to car service charges after the expiration of forty-eight (48) hours from arrival at the point of stoppage, and all car service must be collected, or billed as advances when cars go forward."

"Rule 5. . . . .

"Section B. Cars for unloading shall be considered placed when such cars are held awaiting orders from consignors or consignees, or for the payment of freight charges after the notice mailed or otherwise given, or for the surrender of bills of lading.

"Section C. The delivery of cars to private tracks shall be considered to have been made, either when such cars have been placed on the tracks designated, or, if such track or tracks be full, when the road offering the cars would have made delivery had the condition of such tracks permitted. . . ."

Complaint is made by appellant that the so-called embargo was raised without notice to it, and that such raising caused the bunching of cars and the delay in unloading. The alleged embargo was placed at the request of the appellant. There was no agreement that notice should be given of its removal and no duty rested upon the respondent to do so.

By the Court.—The judgment is affirmed.

A motion for a rehearing was denied, with $25 costs, on February 9, 1915.

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CASPER, Respondent, vs. KALT-ZIMMERS MANUFACTURING COMPANY and others, Appellants, and KALT and another, Respondents.

November 21, 1914—February 9, 1915.

Corporations: Transfers of stock: Restrictions: Corporate articles or charter a legislative act: Mistake: Reformation: Amendment: Waiver of charter provisions: Officers: Conspiracy: Secret profits: Evidence: Sufficiency: Who may be directors: Holder of stock in trust: Stock dividends: Recovery: Limitation of actions: Appeal: Briefs: Disrespectful language: Striking from files.

1. A provision in articles of incorporation that if any of the original stockholders wish to sell their stock they shall first offer it to the board of directors and give that board ten days in which to place it with the stockholders, is valid.
2. Whether a corporation be organized under a general law or by special act its charter is a legislative act and cannot be reformed or amended by the courts.
3. Articles of incorporation must be construed like other legislative enactments, and the testimony of the framers as to what was intended by the language used is not competent.
4. If a mistake was made in articles of incorporation, so that they do not express the intent of the incorporators or stockholders, the statutory method of changing or amending such articles is exclusive.
5. Waiver of a charter provision may validate an act as to which it was waived; but no waiver can be effectual to annul such a provision or render it inoperative in the future.
6. Findings with reference to an alleged conspiracy between officers and directors of a corporation to discriminate against plaintiff in respect to authority, work, and salaries in the company are criticised as vague, unsatisfactory, and unsupported by any definite evidence.
7. Where an officer of a corporation is alleged to have made a secret profit in a purchase of land for it, and other property or equities in property were in part traded for such land or figured in the transaction, positive testimony of such officer that he paid $35,500 for the land—which was the price paid to him by the corporation—cannot be held to be contradicted by the mere fact that nine years after the purchase he was unable to state just how $1,247.83 of the amount was paid.
8. One who holds the mere legal title to stock in a corporation is a

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stockholder within the meaning of sec. 1776, Stats., and may be chosen a director.

9. Where a stockholder claims that stock dividends had been declared but never received by her, and it appears that the corporation transferred the stock in question to other persons more than six years prior to the commencement of her action, her right to recover is barred. If such transfer was tortious she might, as soon as the wrong was committed, have brought an action for conversion or an action to compel reconveyance of the stock to her; and in such a case when the statute of limitations has run upon and bars the legal remedy it bars also the equitable remedy.

10. The provision of sub. 7, sec. 4222, Stats., that a cause of action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud, relates to a fraud for which the sole redress is an action in equity.

11. Language used in a brief in this case is condemned as a flagrant violation of professional ethics and of the duty and respect which attorneys owe to courts; and the brief is stricken from the files.

KERWIN, J., dissents in part.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed in part; reversed in part.*

Action on the behalf of the plaintiff to adjudge void art. VIII of the charter of the defendant corporation; or in case it is held valid to reform it, and as reformed to declare it fully performed and no longer in force; to adjudge plaintiff the lawful owner of certain stock bought from the defendants *Kalt* and to direct its transfer to plaintiff on the books of the corporation; to declare plaintiff rightfully entitled to certain shares of the new stock issued by the corporation and to direct their transfer and delivery to him; to enjoin defendants from enforcing art. VIII during the pendency of the action; to oust the defendants *W. J. Zimmers, Jay Z. Greeley, Matthew Zimmers, Joseph P. Kalt,* and *Kathryn Zimmers* as directors and *Matthew Zimmers* as president of the defendant corporation; and to order an election to fill the offices vacated by the judgment of ouster prayed for.

The defendants *Kalt-Zimmers Manufacturing Company,*

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Michael Zimmers as secretary thereof and in his individual capacity, *Matthew Zimmers, W. J. Zimmers, Jay Z. Greeley,* and *Kathryn Zimmers* answered and by cross-complaint prayed for a judgment canceling the assignment of stock of *Joseph P. Kalt* and *Philip Kalt* to the plaintiff and directing a return thereof to them; and enjoining plaintiff and said *Kalts* from selling or transferring said stock, and enjoining its transfer on the books of the corporation contrary to art. VIII of its charter.

The defendant *Clara Gellerup* by a cross-complaint sought to recover certain dividend stock or its value from the defendant corporation, *Joseph P. Kalt, Michael Zimmers,* and the plaintiff which she alleges was declared before she sold her stock to *Joseph P. Kalt* and *Michael Zimmers* in 1898, but which was never received by her.

During the trial the plaintiff amended his complaint and alleged undue influence on the part of *Michael Zimmers* over *W. J. Zimmers, Matthew Zimmers, Kathryn Zimmers,* and *Jay Z. Greeley* and a conspiracy between them to discriminate against plaintiff in reference to authority, work, and salaries in the defendant company, and that they had drawn from the funds of the corporation unjust bonuses, excessive salaries, and secret profits; and this issue was tried. Further facts are stated in the opinion.

The trial court signed findings of fact covering over thirty printed pages and entered judgment (1) declaring art. VIII void; (2) reforming it and declaring it terminated by limitation of time; (3) decreeing plaintiff to be the owner of the stock claimed by him; (4) ousting the directors above named and the president from their respective offices; (5) ordering an election of officers as prayed for, and dismissing the cross-complaints of the defendants *Michael Zimmers, W. J. Zimmers, Matthew Zimmers, Jay Z. Greeley, Kathryn Zimmers, Kalt-Zimmers Manufacturing Co., Michael Zimmers* as secretary thereof, and *Clara Gellerup,* with costs against the first

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five in the sum of $370.43 and against *Clara Gellerup* in the sum of $76.97. From this judgment the defendants whose cross-complaints were dismissed appealed.

For the appellants *Kalt-Zimmers Manufacturing Company* and others there were briefs by *N. L. Baker* and *W. J. Zimmers,* and oral argument by *Mr. Baker.*

For the appellant *Clara Gellerup* there was a brief by *Doe & Ballhorn* and *H. L. Kellogg,* and oral argument by *Mr. George Ballhorn* and *Mr. Kellogg.*

For the respondent *Casper* there were briefs by *Austin, Fehr & Gehrz,* and oral argument by *G. G. Gehrz.*

For the respondents *Joseph P. Kalt* and *Philip Kalt* there was a brief by *Lyman G. Wheeler* and *R. S. Witte,* and oral argument by *Mr. Wheeler.*

The following opinion was filed December 8, 1914:

VINJE, J. Upon this appeal we have had submitted for our consideration a printed case consisting of 1,384 pages in two volumes, a supplemental case of 93 pages, and six briefs aggregating 712 pages. We were told upon the oral argument that the trial of the case occupied forty days. These facts are mentioned, not because they bear any necessary relation to the importance of the questions involved, but as an evidence of the fact that we have at least sensed the physical magnitude of the case. It is unfortunate that notwithstanding the number and bulk of the briefs submitted some of the more important questions upon which the case turns are not treated at all. This statement is not made by way of criticism, but as an explanation and perchance a justification why the opinion of the court does not accord the case that magnificent amplitude given it by counsel. It is believed, however, that all the legal questions and the evidence necessary to a correct disposition of the appeal have received that degree of attention to which litigants are justly entitled in every case. A brief outline of the issues and of their disposition by the

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trial court has been given in the statement preceding the opinion. This will be supplemented by the recital of such additional facts as are necessary to a correct understanding of the legal questions involved.

The defendant corporation was organized in 1894 with a capital of $5,000 divided into fifty shares, since increased to $200,000, consisting of 250 shares of preferred stock and 1,750 shares of common stock, of which latter 1,350 shares have been subscribed and paid for and were outstanding at the time plaintiff bought the stock he seeks to have transferred to him on the books of the corporation. Its articles of incorporation were signed and acknowledged by *Joseph P. Kalt, Philip Kalt,* and *Michael Zimmers.* Art. VIII thereof read:

"If at any time any of the original stockholders subscribers hereto desire to sell and dispose of their stock, said stockholder or stockholders shall first offer it in writing to the board of directors, stating price and terms, and give the board of directors ten days in which to place it with the stockholders. At the expiration of ten days if no stockholder has purchased and settled for same, said stockholder or stockholders shall have the right to sell to whomever will purchase upon the same sums and price for which it was offered to the board of directors."

In 1901 the plaintiff bought his first stock in the corporation and in 1903 he was elected vice-president, in which capacity and as a salesman he has since acted. September 20, 1911, he purchased from *Joseph P. Kalt* and *Philip Kalt* 413 shares of stock, which added to his previous holding of 262 shares gave him 675 shares. This was just one half of the total common stock then outstanding. The *Kalts* had not offered their stock to the board of directors as required by art. VIII, and the corporation refused to recognize the sale or transfer upon its books the stock sold.

1. Did the trial court err in declaring void the provisions of art. VIII requiring that the stock of the original subscribers should first be offered for sale to the board of directors?

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This question is answered in the affirmative by the case of *Farmers' M. & S. Co. v. Laun,* 146 Wis. 252, 131 N. W. 366, and little need be added to what is there said on the subject. The personal element is as important in the make-up and management of a corporation as it is in almost every other undertaking. Restrictions, therefore, reasonably protecting incorporators or stockholders in their interests by permitting them first to purchase stock offered for sale, should be held lawful as promotive of good management and sound business enterprise.

2. After declaring the article void the trial court industriously, or through the industry of counsel, found that it was no part at all of the articles of incorporation; that it was inserted by mutual mistake; that the article really intended and which in fact did constitute a part of the articles of incorporation read: "If at any time, *until the undersigned, Michael Zimmers, acquires one half of the outstanding stock of the company,* any of the original stockholders subscribers hereto desire to sell," etc., the words in italics being added; and that such article so amended had expired by limitation of time, since *Michael Zimmers* had acquired one half of the stock when the *Kalts* sold to plaintiff. This action of the trial court presents the question of the power of a court of equity to reform or amend the charters of corporations. For obviously the charter under which the corporation had existed for nearly twenty years was amended in an important particular by the insertion of the italicised words above quoted. Upon this question the briefs of counsel are silent, and so are the books as far as any direct authority is concerned, judging from the limited time for examination which we have had. It is, however, not surprising, for it seems a startling and novel use of equity powers. The charter of a corporation is a legislative grant—just as much so when incorporated under a general law as by special act. An amendment to a charter is a legislative act—just as much so when made in pursuance

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of a provision in its charter or in a general law as by special act. *State ex rel. Att'y Gen. v. N. P. R. Co.* 157 Wis. 73, 147 N. W. 219; *Lord v. Equitable L. A. Soc.* 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. N. S. 420. In the latter case the court says:

"When the legislature authorizes a course of procedure whereby a charter may be acquired or amended, action in conformity thereto does not create the charter or make the amendment, but both come into existence through the operation of the statute. The amendment is the act of the legislature the same as the charter itself, and neither has existence except as conferred by statute."

So the amendment or reformation of a charter would be equivalent to the amendment or reformation of an act of the legislature. In other words, it would be a legislative act, and nonjurisdictional because outside the judicial field.

Aside from the considerations mentioned, a charter of a corporation stands upon a different footing than contracts between private parties. It is the organic law of the corporation, required to be filed with the secretary of state and with the register of deeds of the county in which the corporation is located. Sub. 7, sec. 1772, Stats. 1913. Amendments must also be filed. Sec. 1774. Thus a mode is provided whereby any one interested in a corporation as a prospective stockholder, creditor, or otherwise can ascertain definitely just what its organic law is, and govern himself accordingly. If it were subject to reformation or amendment by a court of equity there might be but little safety in examining a charter at any given time. Diligence and vigilance might become only pitfalls. In the present case art. VIII of the charter has been on file for nearly twenty years with the register of deeds of Milwaukee county and with the secretary of state, and during all that time it has spoken to all concerned in unmistakable terms on the subject of the sale of stock by the original stockholders. It must still con-

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tinue so to speak. The legislature has provided methods by which charters may be amended. A court of equity is not one of them. The legislative methods are exclusive.

An observance of the distinction between an amendment and a reformation does not help the case. That which needs reformation is not valid as it stands. Before it can become valid something must be added to or subtracted from it to make it conform to that which was intended. In the case of private contracts the supreme source of power to vitalize them is the concurrent intent of the parties. The contract grows out of and rests upon that. And courts of equity may in proper cases through evidence *dehors* the contract inquire into what it was intended to be and establish it accordingly. But charters are legislative acts, and such acts must be construed from their contents, contemporaneous history, and other legitimate aids to their proper construction. No evidence of the intent on the part of their framers or makers, either individually or collectively, is competent. *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460. The result is that courts have power to construe but not to reform or amend legislative enactments. The charter when acknowledged, signed, and filed became by force of a statute a legislative act, and its framers were no more competent to testify as to what was intended by the language used than would be the framer of a bill passed by the legislature, or a member of the legislature itself. If a mistake is made in a charter so that it does not express the intent of the incorporators or stockholders, the statutory method of changing or amending it offers an adequate, speedy, and simple remedy.

3. It was shown by the evidence and found by the court that in a number of instances of the sale of stock by one stockholder to another previous to the sale of the *Kalt* stock to the plaintiff the provisions of art. VIII had not been complied with, and therefore, the argument runs, it has been annulled by waiver and is no longer operative. The same

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lack of observing the distinction between a contract and a corporate charter is responsible for this argument. No doubt a waiver of a charter requirement may be resorted to in order to validate an act as to which the charter provision was waived. But to hold that the provisions of a charter can by any number of waivers become inoperative in the future would be equivalent to holding that a charter may be annulled by disregarding its provisions. Secs. 3240 and 3241, Stats. 1913, provide how charters may be annulled, and sec. 1789 how a corporation may be dissolved. Waiver by the corporation of charter provisions is not mentioned in these sections.

But the vital objection to holding that a charter provision may be annulled by previous waivers is that no one, upon reading a charter under which a corporation has existed for some time, could tell what provisions were in force and what had been annulled by previous conduct of the corporation. The reasons suggested why a court, even though it had jurisdiction, should not reform a charter apply more strongly here. A party interested in a corporation has a right to rely upon the fact that its charter is what it purports to be. He cannot be met with the statement that such and such provisions of it have been annulled through disregard in the past. Here again the statute as to how charters may be amended must control. To drop out a provision of a charter is an amendment of it. Any material change in the fundamental law of a corporation is an amendment. *State ex rel. Att'y Gen. v. Northern Pacific R. Co.* 157 Wis. 73, 147 N. W. 219.

4. The conspiracy issue has hardly standing room in the case. It was lugged in during the trial, no doubt, to round out the forty days or to discover if possible a new avenue of attack. No part of the judgment is based upon any of the findings made with reference to it, and the findings themselves are vague, unsatisfactory, and not supported by the

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evidence in so far as any definite tortious act is concerned. They find that the defendants named

"have arbitrarily, wrongfully, and without just cause discriminated against said plaintiff in the apportionment and fixing of authority, work, and salaries in said company, and have withheld distribution of its earnings and profits, said defendants *Matthew Zimmers* and *Jay Z. Greeley* have drawn out of its funds and now retain excessive salaries and unjust bonuses, and said defendant *Michael Zimmers* has held, enjoyed, and retained and now holds his position and office in, and the direction, management and control of, said company and of its business at an unfair and excessive salary and other important and valuable benefits and advantages, and has drawn and now retains considerable sums of money by the way of excessive salaries and a profit secretly and wrongfully made by him in certain real-estate transactions for the purchase of said company's former factory site, in which he acted for the use and benefit and on behalf of said company."

This is the most specific finding there is on the subject. One wonders that an expenditure of forty days of trial produced no more definite results in the evidence, for it is no more specific than are the findings. As to the latter it should be stated, in justice to the trial judge, that he did not draw them. They were prepared for his signature by counsel for plaintiff. Their gravamen, except as to the charge of secret profits derived from securing the former factory site, is traceable directly to a disagreement in corporate management and as to the relative value of the services of the plaintiff and of the defendants. The salaries paid were voted in the regular and lawful manner and were paid as voted. That plaintiff now thinks that those of the defendants were too high is natural.

The nub of the factory-site purchase known as the Larkin deal is this: In 1904 the Larkin building was for sale and *Michael Zimmers,* with the consent of the officers of the corporation, bought it for the corporation, but bargained for and took title to the same in the name of his sister in order to

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secure a better price and because it was thought best not to take title in the name of the corporation just then. He swears he paid $35,500 for the property and that was the price paid him by the corporation when it bought it. Upon the trial, occurring about nine years later, he was unable to account for how he paid Larkin $1,247.83 of the purchase price. He swears he paid it, and there is no evidence to the contrary. Other property was in part traded for the Larkin lot, and equities in property belonging to *W. J. Zimmers* also figured in the deal. His failure after such a long lapse of time to account for how the sum of $1,247.83 in a $35,500 deal was paid cannot be held to contradict his positive evidence that he paid Larkin in money or property the sum of $35,500.

5. The court found that *Matthew Zimmers, W. J. Zimmers, Kathryn Zimmers,* and *Jay Z. Greeley* were not *bona fide* stockholders, and therefore under the statute, sec. 1776, and the provisions of the charter, each alike requiring directors to be stockholders, they were ineligible to hold the office of directors. They were found to hold their stock in trust for *Michael Zimmers.* With the correctness of the finding that they held their stock in trust we are not concerned as far as their right to hold office is thereby affected, and that is the only issue upon this branch of the case. They were ousted from office by the judgment, and the president, *Matthew Zimmers,* was also held not entitled to the office, presumably because not a stockholder, though there is a finding that their continuance in office will materially hamper and injure the corporation in its business and growth and will result in irreparable loss to the plaintiff. But this finding is not based upon any tangible evidence. In face of the fact that the corporation has grown from a small concern with a capital of $5,000 in 1894 to one having a capital of $200,000 in 1910, practically without the addition of new stockholders or capital other than that earned by the company, and that it has

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maintained its stock at more than par under the management complained of, mere conclusions and findings of general incompetency cannot avail.

It is settled by the great weight of authority in this country and in England that one who holds the mere legal title to stock is qualified to act as an officer of the corporation, though there is a charter provision or statute requiring officers to be stockholders. 3 Clark & Marsh. Priv. Corp. 2031, 2032 and cases cited; 2 Cook, Corp. (6th ed.) § 623 and cases cited; *In re St. Lawrence S. Co.* 44 N. J. Law, 529; *State ex rel. Rankin v. Leete,* 16 Nev. 242; *In re Argus P. Co.* 1 N. Dak. 434, 48 N. W. 347; *Pulbrook v. Richmond C. M. Co.* L. R. 9 Ch. Div. 610. One who holds stock in trust for the express purpose of qualifying him as an officer is eligible. Cook, Corp. (6th ed.) § 623; *In re Leslie,* 58 N. J. Law, 609, 33 Atl. 954.

A rule requiring that the equitable or beneficial interest in the stock should be in a person in order to render him eligible as an officer would exclude all trustees from acting as corporate officers and in a large measure debar them from investing trust funds in corporate enterprises because they could not adequately protect such funds by participating in the active management of the business. The reason given for a contrary view is that officers of a corporation should be personally interested in its welfare, and that can be the case only when the legal and beneficial interest unite in the same person. We do not so consider it. Trust duties are some of the most sacred duties there are, and the confidence reposed through them is seldom abused. Even where stock is transferred for the express purpose of qualifying one to hold a corporate office, the person so transferring it is personally interested in the sound management of the corporation and would be unlikely to jeopardize his interest by placing the stock in incompetent hands. The rule that merely a legal title qualifies is more in consonance with present business requirements and

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is fraught with no undue hazard to stockholders. The defendants mentioned were improperly ousted from office.

6. *Clara Gellerup* subscribed and paid for nine shares of stock at the time of the organization of the corporation. Subsequently she secured an additional three and one-half shares, making twelve and one-half shares in all. On December 7, 1898, she sold all her stock for $1,375. Six and one-half shares thereof were assigned to *Joseph P. Kalt* and six shares to *Michael Zimmers.* Her husband acted as her agent throughout. He was the factory superintendent of the defendant corporation from the time of its organization until April, 1898, and was familiar with the financial affairs of the company while in its employ. From the time of the sale of her stock until 1912 *Mrs. Gellerup* made no claim against the corporation or any of its stockholders that anything was due her or that she had any interest in the corporation. Now she claims that in February, 1912, she discovered that stock dividends had been declared previous to the sale of her stock, but not transferred to her; that the corporation had wrongfully transferred her dividend stock to *Joseph P. Kalt* or to *Michael Zimmers* or to both. The proof supported her claim that stock dividends had been declared and that she had received no dividend stock, but was rather uncertain as to what had become of all of it. Most of it went to the persons named. The circuit court found that *Mrs. Gellerup,* when she sold her stock in 1898, intended to and did in fact sell all her interest in the corporation, including the dividend stock, and that if she did not she has been guilty of such laches as to bar her right to recover. We think the evidence warrants both findings. But it is immaterial whether or not it does. The six years' statute of limitations was pleaded in behalf of all adversely affected by her claim, and the proof shows that the corporation transferred the stock in question more than six years prior to the commencement of *Mrs. Gellerup's* action. Assuming that such transfer of stock was tortious she

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had two remedies. She could bring her action for damages for the value of her stock wrongfully converted, or she could bring an action to compel a reconveyance of her stock, or failing in that for damages. She therefore had, at the time the wrong was committed, a legal remedy and an equitable remedy for the same wrong. In such cases the statute of limitations runs upon the equitable remedy and bars that when it has run upon the legal remedy. The cause of action upon the legal remedy accrued as soon as the wrong was committed, namely, when the illegal transfer of stock was made. The provisions of sub. 7, sec. 4222, Stats. 1913, that a cause of action shall not be deemed to accrue until the discovery of the fraud, relates to a fraud for which the sole redress is an action in equity. *Buttles v. De Baun,* 116 Wis. 323, 93 N. W. 5; *Boyd v. Mut. F. Asso.* 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171; *Pietsch v. Milbrath,* 123 Wis. 647, 101 N. W. 388, 102 N. W. 342; *Figge v. Bergenthal,* 130 Wis. 594, 109 N. W. 581, 110 N. W. 798; *Ott v. Hood,* 152 Wis. 97, 139 N. W. 762. So the trial court properly dismissed her cause of action with costs against her.

Some statements are contained in the opinion from which inferences reflecting somewhat upon the length of the trial and the bulk of the printed case and briefs may be justly drawn. It should not be inferred from them, however, that the case has been ill prepared or slovenly presented. The briefs, though in our opinion needlessly long, are well arranged and indexed, methodical in their treatment, and have been of great assistance to the court in ascertaining the legal questions necessarily calling for adjudication.

By the Court.—Upon the appeal of the defendants *Kalt-Zimmers Manufacturing Co., Michael Zimmers* as secretary thereof, *Michael Zimmers, Matthew Zimmers, W. J. Zimmers, Jay Z. Greeley,* and *Kathryn Zimmers* the judgment is reversed, and the cause remanded with directions to enter judgment dismissing the complaint upon the merits; and to enter judgment in favor of the above named defendants upon

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their cross-complaints canceling the assignment of stock of *Joseph P. Kalt* and *Philip Kalt* to the plaintiff; directing a return thereof to them and enjoining its sale, or transfer on the books of the corporation, contrary to the provisions of art. VIII of its charter, with costs. The defendant *Clara Gellerup* will take nothing upon her appeal.

KERWIN, J. (*dissenting in part*). I do not agree with that part of the opinion of the court which holds, as I understand it, that a court of equity has no power to act upon articles of incorporation in any case because the charter of a corporation is a legislative grant.

The articles of incorporation constitute a contract between the incorporators, not a legislative act. True, when the incorporators make, execute, and file the articles in accordance with the statutes the articles of incorporation thereupon stand upon somewhat different grounds as regards the rights of the public and third parties dealing with the corporation on the faith of the articles filed than an ordinary contract.

It may be that there could be no reformation to the injury of third parties acting upon the faith of the articles filed. But the opinion seems to hold that in no case can relief be afforded in equity between the incorporators for fraud or mistake in the execution of the articles, whether the rights of others are prejudiced by the relief or not.

I think a court of equity can grant some kind of equitable relief in a proper case where the articles of incorporation do not express the contract of the incorporators.

TIMLIN, J., took no part.

The respondent moved for a rehearing. The motion was denied, without costs, on February 9, 1915, and the following opinion was filed on February 12, 1915:

VINJE, J. The motion for a rehearing upon the main case presents no new questions or arguments of sufficient im-

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portance to merit a reconsideration of the case or a change in the mandate.

We construe the correspondence between the parties to constitute an agreement with reference to the taxation of costs as claimed by appellants, namely, that each party should pay for one copy of the transcript of the evidence and for one half of the original, and that the party prevailing upon the appeal should tax the costs for the copy paid for and for one half of the original; that is, the losing party should reimburse the other for the expense incurred for transcripts. Costs will so be taxed.

By way of justifying their presentation of the case in this court, counsel for appellants, in their brief resisting the motion for a rehearing, say:

"They [counsel] have grown to believe (perhaps erroneously as a general proposition) that courts of equity recognize no limitations upon their powers, and that they enjoy most the finding of new plausible ways for the destruction of rights, however fortified by constitutions, statutes, or well established principles, if once it has been made to seem to them personally desirable to accomplish that end."

This is a severe arraignment of courts of equity, and it must have been intended to have special reference to this court or else it would not have been advanced as a reason why counsel pursued a certain method of presenting the case. That this conclusion is just appears by their language, for they add, "That is why they were not content to submit the cause upon appellants' protection by such barriers of the law." The language is a direct charge that, in the belief of counsel, this court enjoys most the finding of new plausible ways for the *destruction of rights,* however fortified by constitutions, statutes, or well established principles, if once it has been made to seem personally desirable to accomplish that end. Did such a charge emanate from counsel defeated in an important and hotly contested case some allowance could perhaps be

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made for the frailty of human nature smarting under defeat. But such is not the fact. Counsel were successful upon every proposition involved in the appeal. So their language must be considered as the calm, deliberate utterance of their belief upon the subject. So considered it presents a most flagrant violation of professional ethics and of the duty and respect which attorneys owe courts. It is regrettable enough that counsel entertain such a belief respecting this court. It is still more regrettable that they should so act as to make it necessary to put their belief on record, for no court worthy of the name would permit such a studied insult to pass unnoticed.

This court does not claim infallibility. It realizes that it is only a human agency and therefore may err. But it does claim that it is earnestly laboring to administer justice; to preserve, not to destroy rights; to so interpret and apply the constitution, statutes, and principles of law that they shall become the shield of right, not of wrong, and to conserve them in their spirit and integrity to the end that they may truly fulfil the purpose for which they were ordained and established. To accomplish this object to its fullest extent this court needs no unprofessional goad. Judicial labor is not lightened nor is judicial balance strengthened by such language as counsel has used. Hence it is reprehensible from every point of view and deserves the severest condemnation from bench and bar alike. Counsel for appellants will be allowed no costs either for printing brief or for attorney's fees upon the denial of the motion for a rehearing.

By the Court.—Motion for rehearing denied without costs; and appellants' brief upon the motion is ordered stricken from the files.

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LEGRO, Appellant, vs. CARLEY and another, Respondents.

December 10, 1914—February 9, 1915.

Negligence: Destruction of property by sparks from traction engine: Evidence: Sufficiency of spark arrester: Statute construed: Uncertainty: Instructions to jury.

1. In an action to recover for the burning of a barn and other property the evidence is *held* to sustain a finding by the jury that the fire was caused by sparks or cinders emitted from defendants' traction engine.
2. Sub. 1, sec. 1494—57, Stats., includes within its requirements all traction or portable engines, and it was error to exclude evidence offered by plaintiff to show that defendants were running the engine in question in violation of that statute.
3. The requirements of sub. 1, sec. 1494—57, Stats., that the engines mentioned therein shall be "so constructed as to give the most practicable protection against the escape of sparks" and "shall be provided with the most practicable devices to prevent the escape of fire from ash pans or fire boxes," do not render the statute void for uncertainty.
4. The spark arrester upon the engine in question, not being a screen or wire netting on top of the smokestack, but being in the form of a cone of wire screen with a rim on top, set down on the top of the smokestack with the point or apex downward into the stack, and the point having been rusted or burned off so that there was a hole in it, was not in compliance with said statute.
5. An instruction to the jury, to the effect that there was a large amount of testimony tending to show that the spark arrester was not unsafe or defective, and little if any evidence that it was defective or unsafe, was erroneous and prejudicial.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This action was brought to recover damages for the destruction of the plaintiff's barn and harvested crops by fire alleged to have been caused by defendants' negligence in equipping their threshing engine. The answer denies generally the allegations of the complaint and alleges that the plaintiff's dam-

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age, if any, was caused by the contributory negligence of the plaintiff. The jury returned the following verdict:

"(1) Was the fire which burned plaintiff's barn and other property caused by sparks or cinders of fire emitted from the defendants' engine? *A.* Yes.

"(2) Was the spark arrester which was on the defendants' engine at the time of the fire in a defective and unsafe condition? *A.* No.

"(3) If you answer question number 2 by 'Yes,' then answer this question: Was such defective and unsafe condition known to the defendants at the time of the fire? *A.* ——.

"(4) If you answer question number 2 by 'Yes,' then answer this question: Had such defective and unsafe condition of the spark arrester existed for such length of time that the defendants, in the exercise of ordinary care, ought to have known and remedied it? *A.* ——.

"(5) If you answer question number 2 by 'Yes,' then answer this question: Was such defective and unsafe condition of the spark arrester the proximate cause of plaintiff's damage? *A.* ——.

"(6) Was the plaintiff guilty of any want of ordinary care which proximately contributed to the plaintiff's damage? *A.* ——.

"(7) What was the value of the plaintiff's property destroyed by the fire? *A.* ——."

Judgment was rendered for the defendants upon the verdict, from which this appeal was taken.

For the appellant there was a brief by *Goodrick & Goodrick*, and oral argument by *A. B. Goodrick.*

For the respondents the cause was submitted on the brief of *Henry Hay.*

KERWIN, J. On September 15, 1911, the defendants began threshing plaintiff's grain on his premises and shortly thereafter a fire started in the hay in a log barn. The thresh-

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ing engine was placed about thirty or forty feet from the barn. The fire destroyed the plaintiff's property. There is evidence that plaintiff received $448 insurance, which deducted from the value of the property burned left about $1,000 damages sustained, occasioned by the fire.

There is also evidence tending to show that the spark arrester was in the form of a cone made of wire screen with a rim on top set down on the top of the smokestack, point or apex downward into the stack; that shortly after the fire started the engine was removed from the fire; that the spark arrester had been used about seven years; that it was discovered after the spark arrester had been removed that the point or apex extending downward into the smokestack had been burned off or rusted off so that there was a hole in it; that the arrester had been inspected two or three days before the fire, and it was claimed by respondents and denied by appellant that the jar caused by pulling the engine over the blocks after the fire started caused the point of the arrester to fall off.

Expert witnesses testified that sparks would not pass through the hole in the point of the arrester, because of the action of the steam through the exhaust pipe located immediately below the point of the spark arrester, because the action of the exhaust would drive the sparks to the side of the smokestack, and besides the steam was so wet as to extinguish the sparks if any went up through the hole in the point of the arrester; that it was safe to operate the arrester with the hole in it.

There was some evidence, however, that sparks would live to go up the side of the smokestack, and that this would occur in any smokestack; that no practical smokestack could be devised which would not emit some sparks. We think there was sufficient evidence to support the finding of the jury to the effect that the fire which burned the plaintiff's property was caused by sparks or cinders of fire emitted from the defendants' engine.

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The appellant assigns several errors and urges them as grounds of reversal.

1. Sub. 1, sec. 1494—57, Stats., provides:

"Between March 1st and December 1st it shall be unlawful for any . . . traction, or portable engine, and all other engines, boilers, and locomotives, except railway locomotives, operated in, through, or near forest, brush, or grass land, which do not burn oil as fuel, to be operated without a screen or wire netting on top of the smokestack and so constructed as to give the most practicable protection against the escape of sparks and cinders from the smokestacks thereof, and each such engine shall be provided with the most practicable devices to prevent the escape of fire from ash pans or fire boxes. . . ."

The appellant offered to prove that respondents were running their engine in violation of this statute, and the evidence was excluded on the ground, as we understand the record, that the statute does not apply. We think it was error to exclude the evidence. But counsel for respondents insists that the statute is inapplicable on the ground that the phrase "operated in, through, or near forest, brush, or grass land" modifies the phrase "and all other engines, boilers, and locomotives," and does not modify or qualify the first or the second class of engines named in the statute. We cannot assent to this construction. The statute seems to include within its requirements all traction or portable engines and all other engines, boilers, and locomotives except railway locomotives.

It is further claimed by respondents that the statute is void for uncertainty because of the provisions "so constructed as to give the most practicable protection against the escape of sparks." "Such engines shall be provided with the most practicable devices to prevent the escape of fire from ash pans or fire boxes." These provisions do not render the statute void for uncertainty. *Bonnell v. C., St. P., M. & O. R. Co.* 158 Wis. 153, 147 N. W. 1046.

It is further contended by counsel for respondents that if

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the statute is valid there was compliance with it regarding the furnishing of a sufficient spark arrester. On this point the court is of opinion that the spark arrester was not in compliance with the statute. It was offered in evidence and is before us and does not show a screen or wire netting on top of the smokestack.

2. The court instructed the jury:

"A large amount of testimony has been offered tending to show that in the condition that the spark arrester is now in, that it is not unsafe or defective. This evidence tends to prove that the spark arrester in the present condition is as good as that used by the ordinary careful and prudent man. In fact there is little if any evidence that such spark arrester, in the condition it now is in, is defective or unsafe."

This instruction was erroneous and prejudicial. *Wolff v. Carstens,* 148 Wis. 178, 134 N. W. 400; *Coman v. Wunderlich,* 122 Wis. 138, 99 N. W. 612; *Bodenheimer v. C. & N. W. R. Co.* 140 Wis. 623, 123 N. W. 148; *Ferguson v. Truax,* 132 Wis. 478, 110 N. W. 395, 111 N. W. 657, 112 N. W. 513; *Till v. State,* 132 Wis. 242, 111 N. W. 1109.

Several other errors are assigned and discussed by counsel for appellant, but since they are not likely to occur upon another trial we need not consider them.

3. It is argued by counsel for respondents that the plaintiff was guilty of contributory negligence as matter of law. Whether he was guilty of contributory negligence was for the jury.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

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EKEGREN and another, Appellants, vs. MARCOTTE, Respondent.

January 12—February 9, 1915.

Dower: Wife "residing out of this state:" Statute construed.

1. **Under sec. 2160, Stats., providing that "any woman residing out of this state shall be entitled to dower only of lands of her husband, being in this state, of which he died seised," the words "residing out of this state" refer, not to the time of the husband's death, but to the time of the conveyance of the land by him without her signature. *Bennett v. Harms*, 51 Wis. 251, overruled.**
2. **Even though the husband is a resident of Wisconsin the wife may be "residing out of this state," within the meaning of said statute.**

APPEAL from a judgment of the circuit court for Polk county: ORREN T. WILLIAMS, Judge. *Reversed.*

This action was brought to quiet title to eighty acres of land in Polk county in which, it is claimed, the defendant, *Ede Marcotte,* has a right of dower. The complaint prays that the plaintiffs have judgment that their claim and title be established against any claim of the defendant, and that she be forever barred against claiming any right or title to the lands in question adverse to the plaintiffs.

The answer denies upon information and belief the plaintiffs' ownership of the lands described in the complaint, and further alleges that she is the widow of one Frank Marcotte, through whom plaintiffs claim to have acquired the said premises, and as such widow claims a right of dower in the lands described, and denies generally other allegations of the complaint.

The court made the following findings: That Frank Marcotte and *Ede Marcotte* were married in the province of Canada on the 4th day of October, 1875, and ever since have been and now are husband and wife; that Frank Marcotte and the defendant came to Wisconsin in 1880 and lived in the town of Somerset, St. Croix county, Wisconsin, about four or five

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years, and then left Wisconsin and lived at various places, and finally Frank Marcotte returned to Wisconsin some time prior to March 24, 1900, his wife, *Ede Marcotte,* being at that time at New Bedford, Massachusetts; that March 24, 1900, Frank Marcotte purchased and became the owner of the north half (½) of the northwest quarter (N. W. ¼) of section one (1), township thirty-four (34) north, of range sixteen (16) west, in Polk county, Wisconsin (being the premises described in the complaint), by proper conveyances of record; that on the 3d day of May, 1906, Frank Marcotte, by an instrument in writing, conveyed said premises to the plaintiffs, which said instrument was recorded in the office of the register of deeds of Polk county June 3, 1906, but which said instrument was not signed by the defendant *Ede Marcotte,* who was then and there the wife of Frank Marcotte, the said *Ede Marcotte* being at that time at New Bedford, Massachusetts; that the plaintiffs have been in the actual possession of the premises above described and the whole thereof since May, 1906, and are still in such possession; that the defendant *Ede Marcotte,* in the latter part of the year 1913, came to Wisconsin and purchased a small store at New Richmond, Wisconsin, and intends to make said place her future home; and as conclusion of law the court found that the complaint should be dismissed with costs.

Judgment was entered in accordance with the findings of fact and conclusion of law dismissing the complaint on its merits, from which this appeal was taken.

For the appellants there was a brief by *Kennedy & Yates,* and oral argument by *W. T. Kennedy.*

For the respondent the cause was submitted on the brief of *McNally & Doar.*

KERWIN, J. In the conveyance in question the husband of defendant represented himself a single man. It is established that at the time of the conveyance and for many years

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prior thereto the defendant was not residing in the state of Wisconsin. Point is made by counsel for respondent that the husband at the time of the conveyance was a resident of this state, therefore the defendant must be regarded as a resident under the rule that residence of husband is residence of wife. It is very doubtful at least whether the evidence shows that the husband of defendant was a resident, but in any event the evidence shows that the defendant was not residing in Wisconsin within the meaning of the statute under consideration and hereafter discussed. It is also contended by counsel for respondent that forty of the eighty acres conveyed by the husband were a homestead, therefore the deed as to such forty at least was void under sec. 2203, Stats., which provides that no alienation by a married man of his homestead exempt by law from execution without his wife's consent, evidenced by her act of joining in the deed, shall be valid or of any effect whatever.

The difficulty with this contention is that there is no evidence that any part of the land in question was the homestead of Frank Marcotte, husband of defendant.

This case turns upon the construction of sec. 2160, Stats., which provides:

"A woman, being an alien, shall not on that account be barred of her dower, but any woman residing out of this state shall be entitled to dower only of lands of her husband, being in this state, of which he died seised; and the same may be assigned to or recovered by her in like manner as if she and her husband had been residents of this state at the time of his death."

Counsel for respondent relies upon *Bennett v. Harms,* 51 Wis. 251, 8 N. W. 222, in which the following language is used: "The nonresidence intended by this statute is at the time of the death of the husband, and not at the time of the conveyance of the land."

We disapprove of this language, and so far as the case holds

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that the nonresidence intended by the statute is at the time of the death of the husband the case is overruled.

This statute was taken from Michigan and received construction there in two cases: *Pratt v. Tefft,* 14 Mich. 191, and *Ligare v. Semple,* 32 Mich. 438. In the former it was said that "a woman residing out of this state at the time of her husband's death is not entitled to dower of lands lying within this state, of which he had been seised, but which he had conveyed without her joining." In the latter case (32 Mich. 438) the court holds that a wife who is a nonresident of the state at the time the husband makes an absolute conveyance of land, divesting himself entirely of his seisin and estate, has no right of dower under the statutes of Michigan.

These two Michigan cases are referred to and discussed in *Bennett v. Harms, supra,* and we think it clear that the doctrine laid down in *Ligare v. Semple, supra,* is the correct doctrine and rules the instant case.

If the rule contended for by respondent were adopted, it is clear that the purpose of the statute, in many cases at least, would be defeated. Under such a construction the wife might remain out of the state and reside elsewhere during the time the husband was making absolute conveyances of his real estate and delivering seisin and possession, and if afterwards she came into the state and resided there at the time of his death she would have dower in all lands previously conveyed by him while she resided out of the state. We do not think such is the proper construction of the statute. But on the contrary we think the "residing out of the state" mentioned in the statute refers to the time of the conveyance. This construction is in harmony with the Michigan cases above cited under a similar statute.

It follows that the judgment of the court below must be reversed.

By the Court.—The judgment is reversed, and the cause remanded with instructions to render judgment for plaintiffs according to the demand of the complaint.

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JEWEL TEA COMPANY, Appellant, vs. WEBER, Respondent.

January 12—February 9, 1915.

Master and servant: Statement of account: Shortage: Evidence: Bills and notes: Duress.

1. **Defendant, who had been employed by plaintiff as a salesman or manager, assisted plaintiff's auditor in making up a statement of goods on hand and business done, which showed a shortage for which he was indebted to plaintiff. He signed, of his own free will, a certificate that such statement was correct, and afterwards gave his note for the amount of the shortage. In an action on such note it is *held* that it was not sufficient to defeat a recovery for defendant to testify that he did not owe plaintiff anything, that the statement must have been wrong because he knew he kept his accounts correctly, and to give an explanation as to how the shortage might have occurred, where he could point out no inaccuracy in the statement and did not know that the shortage in fact occurred in the way suggested.**
2. **The entire controversy having been tried in such action on the note, and it appearing that the amount for which it was given was in fact due, it is immaterial whether or not the note was given under duress.**

APPEAL from a judgment of the municipal court of Rock county: HARRY MAXFIELD, Judge. *Reversed.*

Action to recover on promissory note. In 1911 and 1912 the plaintiff was engaged in the business of selling teas, coffees, and other wares on the premium plan, and carried on its business by the use of a horse and wagon driven over six routes about Janesville and six routes about Beloit. Each route was designed to take one day's time and was traveled once in two weeks. On October 5, 1911, the plaintiff entered into a contract with the defendant, under which he was to sell, deliver, and take orders at a salary of $15 per week and a commission of ten per cent. additional on weekly sales in excess of $150. Among other things, the contract provided that negligence, inattention to duties, shortage in accounts, drunkenness, gambling, mismanagement, and failure to obey

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plaintiff's rules would constitute just cause for defendant's discharge without previous notice; otherwise thirty days' notice would be required by either party to terminate the agreement. On February 10, 1912, a representative of the plaintiff made an inventory of the merchandise in defendant's possession and an audit of defendant's accounts, as a result of which the plaintiff claimed a shortage of $71.70, and thereafter a settlement was had between the representative of the plaintiff and the defendant, the defendant turning over a salary check for $25.90, which, together with an allowance of $2.50 commission and the note in suit for $43.30, made up the shortage. The note was not paid when due, and plaintiff brought this action to recover thereon. The defendant denied liability on the note on the ground that there was no consideration therefor and that the note was given under duress, he alleging that he was threatened with criminal prosecution unless the note was given and the shortage made good. Defendant also counterclaimed for thirty days' prospective salary by reason of his unlawful discharge, and for salary earned up to the time of his discharge, which was alleged to be due and unpaid. The case was begun in justice's court, where judgment was rendered for plaintiff. An appeal was taken to the municipal court, where judgment was entered dismissing plaintiff's complaint and rendering judgment for defendant on his counterclaim, and from such judgment plaintiff appeals to this court.

M. P. Richardson, for the appellant.

Edward H. Ryan, for the respondent.

BARNES, J. The court entertains very serious doubt about the sufficiency of the evidence to support the finding that the note sued upon was given under duress. It is unnecessary to pass upon the question, however.

Defendant took charge of plaintiff's business about October 8, 1911. Certain goods and property were placed in his

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hands, of which an inventory was taken. Other goods were shipped from time to time as needed. Some were stored in Janesville and some at Beloit. It was defendant's duty to remit such cash as he collected on sales and to report sales on credit. He was checked up by an auditor of the plaintiff from time to time, once on October 31, again on December 30, and finally on February 10, 1912. In these audits, after the first one, defendant was charged with the amount of goods on hand at the date of the previous audit, and the amount forwarded in the interim at the prices at which they were to be sold, and he was credited with the goods on hand when the audit was made, the cash remitted, and the accounts outstanding. The audits were signed by the auditor and the defendant. In the one made December 30th the defendant's credits overran his debits by forty-five cents. The final audit, dated February 10th, contained the following certificate signed by the auditor and the defendant: "We certify the above to be a true and correct statement of goods and premiums on hand and business done at this branch since the last check up." This audit shows that defendant was short $71.70. There appears to be no controversy as to the amount of goods on hand when the audit of December 30th was made, nor as to the goods subsequently shipped, nor as to the cash remitted, nor the amount of outstanding accounts. The goods on hand were inventoried by both parties. We do not find any claim on the part of the defendant that he was subjected to threats or that he did not act of his free will in certifying to the correctness of the audit. The evidence relating to duress pertains to what took place when the auditor was endeavoring to make defendant settle for the agreed amount of the shortage. Defendant actively participated in making up the final statement, observing the account as made up and the prices placed upon the goods. He objected to charges amounting to $7, and his objection was allowed. Westphal, the auditor, testifies to the correctness of the statement, and his evidence is corrob-

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orated by that of Bristol, the defendant's successor, who was present when the statement was made up.

The defendant insisted that he had accounted for everything that came into his hands and that there was some mistake in the account somewhere, but just wherein it was wrong he was unable to state; so he signed the certificate quoted above. He took much the same position on the trial, and offered two possible theories on which it might be wrong. He said that he was not familiar with the prices of some premium goods in his possession and did not know whether the auditor made correct charges against him on account of such goods. He further said that the company sent a man to help him out, and that this employee had access to the goods stored at Beloit, and that when he went to where they were after the helper left, the box in which the goods were stored was unlocked and the goods were scattered around; so that some of them might have been stolen, but he didn't know whether they were or not. The amount of goods stored at Beloit appears to have been small, less than $300 worth. It is not probable that one quarter or more of them could have been stolen without defendant knowing that a theft had been committed.

We do not see how it makes much difference in this case whether the relation between the plaintiff and the defendant was that of principal and agent or of master and servant, or that defendant should be treated as a bailee for hire as to goods left in his charge rather than as a purchaser. There is not a single item of charge made against the defendant which he disputes. He simply relies on the general statement that the account must be wrong because he knows he kept his accounts correctly. He puts forward some explanation as to how the shortage might have occurred, but does not know that it did occur in such manner. Defendant's testimony neither contradicted nor put in issue any fact testified to in behalf of the plaintiff. It simply attempts to take issue with the conclusion which logically follows from such facts. We think it

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was incumbent on the defendant to show wherein the account which he certified to be correct was in fact erroneous in any view of the case. Where a debit and credit account is presented to a party which shows a balance due from him, it is not sufficient for the debtor to say that he can point out no inaccuracy in the account but he knows that he does not owe anything. This is a defense which it would be impossible for the creditor to meet. Under the circumstances of this case, it was incumbent on the defendant to show wherein the account presented was erroneous, and this he has not done.

If the amount for which the note was given was in fact due, it makes no difference whether duress was used to obtain the note or not. The entire controversy had been tried. If plaintiff might not recover on the note, it was entitled to judgment for the amount for which the note was given. If the indebtedness existed, the plaintiff was justified under its contract in discharging defendant when it did, and no recovery should have been allowed on defendant's counterclaim.

By the Court.—The judgment appealed from is reversed, and the cause is remanded with directions to enter judgment for the plaintiff for $43.30, with interest at six per cent. from February 10, 1912, with costs, defendant to take nothing on his counterclaim.

LEWIS, Appellant, vs. FARMERS' MUTUAL FIRE INSURANCE COMPANY OF THE TOWN OF CLARNO, Respondent.

January 12—February 9, 1915.

Insurance: Lightning: Loss of horse: Adjustment procured by fraud: Pleading: Evidence: False representations made through another person: Estoppel: Retention of assessment paid.

1. In an action upon a mutual insurance policy to recover for loss of a horse claimed to have been injured by lightning, the evidence is *held* to sustain findings by the jury to the effect that the con-

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dition of the horse was not the result of injury from lightning, and that by false and fraudulent representations plaintiff had induced defendant's officers to include his claim in an assessment levied by them.

2. Under an answer alleging that plaintiff made such false and fraudulent representations, it was competent to show that he caused the representations to be made to the defendant through a veterinary surgeon by means of wilful, intentional misstatements to the latter or concealment of material facts from him; and the effect of the representations so made was the same as if plaintiff made them personally.

3. The inclusion of plaintiff's claim among those for which the assessment was levied, having been induced by fraud, had no binding force as an adjustment or settlement of the claim.

4. Plaintiff being a member of the defendant company and insured against loss on other property, the amount paid by him on such assessment was properly retained by defendant, the fact that the loss of the horse was not covered by his policy making no difference.

APPEAL from a judgment of the circuit court for Green county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

Action upon an insurance policy to recover for the loss of a horse claimed to have been injured by lightning. The answer denied the fact that the horse was injured by lightning and alleged that defendant was induced to adjust the loss by reason of the false and fraudulent representations of the plaintiff that the cause of the injury to the horse was lightning. The horse, it was alleged, was injured on September 5, 1910, during the life of the policy, was rendered useless, and on the 18th of September it was, by the advice of a veterinary surgeon, killed. November 1, 1910, an assessment, including plaintiff's claim, was levied and plaintiff paid his share thereof. The jury found (1) that plaintiff knowingly and with intent to cheat and defraud the defendant falsely and fraudulently represented to its officers whose duty it was to investigate and pass upon his claim that the horse was injured by lightning; (2) that said officers of the defendant believed and relied upon such false and fraudulent representations at the time they included plaintiff's claim in the as-

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sessment levied November 1, 1910; (3) that the officers of the defendant were induced by said false and fraudulent representations to include plaintiff's claim for $100 in the assessment of November 1, 1910; and (4) that the condition of the horse was not the result of injury from lightning. Judgment upon the verdict was entered for the defendant and the plaintiff appealed.

J. L. Sherron, for the appellant.

Wm. H. McGrath and *Oliver S. Rundell,* for the respondent.

VINJE, J. 1. It appears from the evidence that the horse while at pasture on September 18th had slid or fallen into a creek; that while lying there he was, at the instance of plaintiff, examined by Dr. Raub, a veterinary surgeon, who from his examination concluded the cause of his injury was lightning and so reported to the company for and on behalf of plaintiff. It further appeared from plaintiff's own testimony that the horse was ailing as early as September 5th. He testified as follows:

"On September 5, 1910, I shipped hogs to Chicago. I was in Chicago a few days, and I came home, met the hired man, Harry Butts. Butts told me Billy had been down. He had got him up himself every morning since I was gone. Next morning Irving told me the same thing. *Q.* Was anything said about lightning? *A.* He said he found him over in the pasture on the bank, and the way he was lying and when he got him up he thought he was struck by lightning. I said we would leave the horse in the pasture where he was a few days. Maybe he would get better. About September 11th he fell in the creek. And we took a team and chain; we pulled him out. It was a slippery, muddy place; low bank, no higher than the horse's side. I drove the team myself and hauled him out on the bank. The horse stood around the barn a couple of days and he would go up in the pasture and eat well. Along about the 17th or 18th of September he went down in the pasture and could not get up. So I called him (Dr. Raub) on the 18th. He says, 'What is the matter?'

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I says, 'I have a horse over here in the pasture; I think he was struck by lightning; all the symptoms are like it.' I told him about the 5th of September, when I was in Chicago; when I came home the boy said he was down, and he wanted to know why I hadn't called him sooner. I said I thought he would get over it by himself and I would not be bothered in calling a doctor. After he killed the horse he says, 'The horse is paralyzed.' He says, 'You have the horse appraised and I will notify the company when I go down. I will notify them. You don't need to notify them. I have acted many times for the company. They will accept my testimony this time.' "

Dr. Raub testified that plaintiff did not inform him that the horse had fallen down previous to the 18th when he examined him, and that he paid some attention to the fact that plaintiff informed him the horse had been all right before it got down where it was September 18th; that such information was material; that had he known the horse had been pulled out of the creek a few days before by hitching a chain to his legs he would not have been of the opinion that the horse was injured by lightning. There is further evidence by one Loomis, who had worked for plaintiff during the summer, that previous to September 5th the horse seemed to have spine trouble, he could not get his head up; his gait when he walked was "waving around;" when working he would give out and another horse would have to be substituted for him; that this happened a number of times, and the plaintiff was informed of and knew it.

There is nothing to show that the officers of the defendant did not rely upon the statement made to them by Dr. Raub. They reposed confidence in him, as he had often been employed by them to investigate claims, and relied upon the statements made by him as to the cause of injury to the horse. It is true that fraud must be established by clear and satisfactory evidence and that the burden to so establish it rests upon the party making the charge. The defendant seems to

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have satisfied both the trial court and the jury that fraud on the part of plaintiff was established by evidence sufficiently clear and satisfactory to satisfy the rule announced. We cannot say that the proof fails to meet the legal requirements. The evidence justifies every answer made by the jury.

2. The court instructed the jury relative to the first question that they were "not limited in the scope of this inquiry to representations made by plaintiff personally to the president, secretary, or treasurer of the company, but" it "includes representations made to them by the plaintiff indirectly through another. In other words, if the plaintiff by wilful, intentional misstatements or concealments of fact to Dr. Raub caused such false representations to be made or conveyed to such officer, their effect is the same as if made by plaintiff himself." Exception is taken to this charge on the ground that there is nothing in the testimony to warrant it and that there were no sufficient allegations in the pleadings to sustain a charge that plaintiff made misstatements to Dr. Raub or concealed material facts. The exception is not well taken. The answer sufficiently charges the fact of fraud and the evidence warrants the instruction. The jury were justified in finding that plaintiff misstated and concealed material facts in his conversation with Dr. Raub.

It was not necessary, as urged by plaintiff's counsel, that the answer should allege that the false representations were made to defendant by plaintiff *through an agent,* naming him. It was sufficient to allege the fact that plaintiff was guilty of fraudulent conduct, stating wherein it consisted. Under such an allegation proof of fraud by plaintiff personally or through an agent, or both, was admissible. The maxim *Qui facit per alium facit per se* is still recognized in law. "An allegation as to the act of the principal includes the act of the agent." *Burnham v. Milwaukee,* 69 Wis. 379, 384, 34 N. W. 389.

3. The claim that the inclusion of plaintiff's loss in the assessment of November 1, 1910, constituted an adjustment

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thereof binding upon the company and not capable of being defeated by proof of fraud on the part of plaintiff inducing it, cannot be sustained. The case was tried upon the theory that a settlement of the loss had been made, and the material question passed upon by the jury was whether or not such settlement had been obtained by means of fraud. The jury found that it had and that destroyed its binding effect and left plaintiff to recover, if he could, upon the strength of his policy. Since the jury negatived injury from lightning, he failed to show injury within the terms of the policy and judgment was properly awarded the defendant.

4. Plaintiff was insured to the amount of $2,800 on buildings, live stock, farm utensils, etc., so defendant properly kept his share of the assessment levied November 1st, as he was still a member. The fact that his horse had died from a cause not covered by the policy made no difference as to the amount of the assessment due from him.

By the Court.—Judgment affirmed.

ROMEY, Respondent, vs. ROCK COUNTY SUGAR COMPANY, Appellant.

January 12—February 9, 1915.

Contracts: Growing sugar beets: Pitting: Failure to cover: Spoiling: Right to recover price: Appeal: Undetermined questions of fact.

In an action to recover the contract price of sugar beets grown for defendant and compensation for pitting them, it appeared that plaintiff agreed to cover the beets when pitted. The trial court found that he did cover them, but there was no evidence to support such finding. It not appearing clearly from the evidence whether the subsequent spoiling of the beets was caused by failure to cover them, upon reversal of the judgment for plaintiff the cause is remanded for determination of the questions whether he in fact fulfilled his contract by covering the beets, and, if he did not, whether the spoiling was caused by his failure to do so.

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APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

Action to recover the contract purchase price of sugar beets and compensation for pitting same.

January 18, 1911, the plaintiff entered into a written agreement with the defendant to plant, cultivate, and harvest in good and workmanlike manner two or more acres of sugar beets and deliver the same to the defendant, who was to furnish seed and give instructions for doing the work. The agreement provided that "the title to said seed and to the crop of beets when the same begin to grow shall be and remain in the company [defendant]. Said beets shall be delivered by the grower to the company at its receiving station and subject to the usual deduction for tare, leaves, improper topping, damaged beets, dirt and other refuse, at such times as required by the company." The defendant was to pay $5 per ton net weight for beets averaging fourteen per cent. or less of sugar and fifty cents per ton for each additional one per cent. of sugar.

The plaintiff planted, cultivated, and harvested six acres of beets, averaging thirteen tons per acre, in accordance with the terms of the contract. The trial court found that the beets were ready for delivery about October 15, 1911; that defendant was so notified by plaintiff, but that it informed him that it could not receive the beets owing to a lack of cars, and that about the first week of November it requested him to pit and suitably cover same, for which service it would pay him forty cents per ton; that in pursuance of said request and promise he did pit and suitably cover the beets, but owing to a thawing temperature the beets heated and became unfit for use, and defendant refused to receive or pay for them. Judgment for the plaintiff was rendered for the contract price of the beets, viz. $390, plus $31.20, the agreed price for pitting the same, less $60 advanced by the defendant and $10.50 for seed furnished by defendant, leaving a balance of

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$350.70, with interest and costs. From this judgment the defendant appealed.

For the appellant there was a brief by *Jeffris, Mouat, Oestreich & Avery,* and oral argument by *O. A. Oestreich.*

J. H. Page, for the respondent.

WINSLOW, C. J. The case is simple. The title to the beets was in the defendant. The plaintiff cultivated and harvested them properly and would have delivered them had the defendant been able to obtain cars to transport them. While waiting for cars the beets were lying in small piles in the field and were frozen. This was not the plaintiff's fault. It seems also that freezing does not materially harm them if they are not allowed to thaw out. While in this condition, the parties agreed that plaintiff should pile them in two large piles and cover them, at the price of forty cents per ton. This was called pitting them. The reason for covering was that they might remain frozen. This was a perfectly valid contract. If it was faithfully performed by the plaintiff he would necessarily be entitled to recover the contract price of the beets, as well as the contract price for pitting, regardless of the question whether the beets spoiled as a result of a sudden change of weather. If not carried out, however, *i. e.* if the piles were not covered as agreed and the beets thawed out by reason of the failure to cover, it is plain that plaintiff should not recover either for the beets or for pitting them.

Here arises the difficulty in the case. The court found that the plaintiff covered the beets. Examination of the record shows that there is no evidence sustaining this finding, hence it drops out, and the situation is that the plaintiff piled up or "pitted" the beets only and that the change in temperature caused them to thaw and spoil. Defendant claims that the spoiling was caused by the failure to cover; plaintiff by his brief claims that covering would have done no good but would have made them spoil faster. We do not feel that the

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evidence is clear enough either way to justify us in deciding this question on the present record. We think the case should be remitted to the trial court to determine two questions, viz.: (1) whether the plaintiff in fact fulfilled his contract by covering the piles of beets; (2) if not, whether the beets spoiled by reason of the failure. If the first question be answered in the affirmative, judgment for the plaintiff will necessarily follow. If, however, it be answered in the negative, and only in that event, it will be necessary to answer the second question. If this be answered in the affirmative, then there can be no recovery by the plaintiff; if in the negative, he should recover the price of the beets, but not the price of pitting them. The findings already made up to the finding that the plaintiff covered the beets are not disturbed and are not to be again tried. Only the questions indicated in this opinion are to be reopened, and upon those questions the trial court may consider not only the evidence already taken, but any further material and relevant evidence which the parties may produce.

By the Court.—Judgment reversed, and action remanded for further proceedings in accordance with the opinion.

BARINGER, Appellant, vs. ROCK COUNTY SUGAR COMPANY, Respondent.

January 12—February 9, 1915.

Contracts: Sales on commission: Failure to fill orders: Measure of damages.

By contract defendant gave plaintiff the right to sell, on commission, beet pulp from its factory at a certain price, reserving the privilege of supplying its Western market, but directing plaintiff to go ahead and sell all the pulp he could and mail orders direct to the factory, the same to be filled as soon as the factory started up, and to confirm orders until instructed to the con-

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trary. Plaintiff accordingly secured and confirmed orders for pulp until notified to desist, but defendant was unable to fill a part of such orders. *Held*, that plaintiff was entitled to recover, as damages for such failure, his commissions on pulp not delivered and the amount he was obliged to pay his customers to secure cancellation of their orders.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

Action to recover compensation for selling sugar beet pulp and damages for breach of contract.

This is the claim: A contract was entered into between plaintiff and defendant whereby the former was "permitted to dispose of the pulp of the latter's beet sugar factory, located at Janesville, Wisconsin, for such price as would net defendant $13.80 per ton at Janesville, less seventy-five cents per ton to be allowed plaintiff, as commission," such permit not to prevent defendant from supplying their Western trade and introducing and advertising their product for feed, but plaintiff to take all orders for pulp he could until notified to desist; the orders to be sent direct to the factory, be recorded, and shipments to be made promptly.

Pursuant to such contract plaintiff sent in orders for 2,300 tons of pulp before being notified that deliveries could not be made. Seven hundred and seventy tons were delivered on such orders, and deliveries were refused on the balance. The entire output of the factory for the season was a little over 1,530 tons. The residue over that so delivered was disposed of by defendant to supply its other trade. Plaintiff did not take orders subject to confirmation at the factory. He confirmed them himself, relying on being notified not to do so if there was any need to cease soliciting. In due time he wrote defendant he was working on some large orders and wished to have instructions before going ahead, "if there was any danger of deliveries not being made." To that defendant answered: You can keep on taking orders and send them to Janesville and as soon as the factory has started up we can

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fill the orders for delivery as purchasers want. "You may sell all the pulp you can, and mail the orders right to Janesville." Defendant did not notify plaintiff to cease his activity until November 15, 1906. At that time the latter was informed that he had, probably, sent more orders than could be filled. Up to that he had been encouraged to take orders. He waited some little time after sending in the last orders before confirming them to his customers. Not hearing anything from defendant of a discouraging nature, he confirmed. Thereafter he received the notice aforesaid. By reason of orders not being filled, plaintiff was compelled to make up loss to his customers to the extent of $802.50.

The court found in favor of the defendant upon the ground that the contract was a mere permit to sell pulp limited to the amount which could be spared over what might be required by defendant to supply its Western market, in order to introduce it and advertise it for purposes of feed, that all that could be spared under that arrangement was delivered to plaintiff.

Judgment was rendered accordingly.

M. P. Richardson, for the appellant.

For the respondent there was a brief by *Jeffris, Mouat, Oestreich & Avery,* and oral argument by *L. A. Avery.*

MARSHALL, J. If the court's view of the facts be correct, obviously, its conclusion is unassailable. But is it correct?

We cannot well support the finding that the contract with plaintiff was of the limited character mentioned. The agreement was made by correspondence. When the matter was first definitely put in shape it was by a letter to plaintiff, under date of July 30, 1906, containing terms as stated in the court's findings. Plaintiff replied August 2d thereafter practically accepting defendant's proposition but calling for some explanations. Defendant replied under date of August 14, 1906, confirming the previous proposition but without

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specifically replying to the inquiry in plaintiff's letter. That left the question of whether plaintiff could sell the pulp, absolutely, or only subject to confirmation of his orders at the factory. To clear up that, he wrote under date of August 7, 1906, referring to the closing letter from defendant: "As we understand it we are authorized to confirm orders for any reasonable amount of pulp until we have instructions from you to the contrary." That was a fair construction of the arrangement. There was no reply calling it in question. August 9th plaintiff asked for cautionary instructions if there was any danger of his taking orders that could not be filled. To that defendant replied: "You may sell all the pulp you can, and mail the orders right to Janesville." That was what plaintiff did, taking the precaution along toward the last, of delaying confirmation to afford defendant ample time to protect itself, and give notice so he would not run the danger of incurring obligations to his loss. He did not receive notice to desist until he had taken and confirmed the orders mentioned in the complaint.

Thus the contract between appellant and respondent was this, clearly: Respondent offered appellant the right to sell its product at a price to net to the factory $13.80 per ton Janesville, less seventy-five cents per ton allowed for commission, reserving the privilege of supplying its Western market; but appellant to go ahead and sell all the pulp he could and mail the orders direct to Janesville, the same to be filled as soon as the factory started up, and to confirm orders until instructed to the contrary. If the court below had found the contract to be as suggested, judgment, as matter of course, would have been awarded plaintiff for the commission on the amount of pulp not delivered and the amount appellant was obliged to pay to secure cancellation of orders with interest as prayed for in the complaint.

The error below, it seems, occurred by taking respondent's letter of July 30, 1906, as showing what the contract was in-

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stead of the entire correspondence which commenced with such letter and ended, so far as completing the agreement and understanding of its purport is concerned by respondent's letter of August 9, 1906, saying you may sell all the pulp you can.

By the Court.—The judgment is reversed, and the cause is remanded for judgment in favor of plaintiff for the amount due him according to the findings on the basis indicated in the opinion less $57.75 unpaid on the pulp, the balance being $1,894.75 with interest from the 13th day of November, 1906.

KOPPLIN, Appellant, vs. KOPPLIN, Respondent.

January 12—February 9, 1915.

Divorce: Cruel and inhuman treatment.

In an action for divorce on the ground of cruel and inhuman treatment, wherein defendant counterclaimed on the same ground, a finding by the trial court that neither party was entitled to a divorce on that ground is sustained.

APPEAL from a judgment of the county court of Dodge county: C. W. LAMOREUX, Judge. *Affirmed.*

This is an action for a divorce from the bonds of matrimony based upon the ground of cruel and inhuman treatment of the plaintiff husband by the defendant wife. The defendant counterclaims and alleges cruel and inhuman treatment of her by the husband and prays for a judgment of divorce.

The plaintiff was fifty-seven years of age and the defendant forty-one years of age. Both parties had been married before. It appears that the plaintiff is a German and the defendant a Hungarian; that they had been unacquainted up to a short time before their marriage, and at their third or

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fourth meeting they became engaged to marry and were married on November 14, 1912. They resided in Beaver Dam, Wisconsin. The testimony showed that the defendant had endangered her life by eating sulphur and that it was necessary to have physicians attend her at that time. The plaintiff testified that the defendant's conduct worried him and made him nervous, so that he could not sleep; that she would not cook for him and treated him with contempt, and so harassed him by ill treatment that he was afraid of his life. The defendant put in a counterclaim for a divorce on the ground of cruel and inhuman treatment. She testified that the plaintiff was the aggressor in their family troubles; that he called her abusive names in his fits of anger; that he refused to provide the necessaries of life; that when he learned she was with child he became angry, mistreated her, and wanted her to see a doctor for the purpose of producing a miscarriage; that his conduct was disrespectful, abusive, and calculated to deprive her of his support and to drive her from his home.

The county court held that neither party was entitled to a divorce from the bonds of matrimony. The court found that neither party was guilty of cruel and inhuman treatment towards the other. The plaintiff was adjudged to pay the clerk's fees and no costs were allowed. From such judgment the plaintiff appeals. The defendant has filed no brief in the case in this court nor have her counsel appeared before this court in defense of the judgment.

For the appellant there was a brief by *Geo. B. Swan* and *C. E. Hooker,* and oral argument by *Mr. Swan.*

SIEBECKER, J. An examination of the record has led us to the conclusion that the trial court was justified in finding that the evidence in the case does not establish that either party was guilty of cruel or inhuman treatment toward the other. The evidence was unsatisfactory and lacks convincing

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force to show that either party was guilty of conduct constituting cruel or inhuman treatment. The conduct of both parties evinces a lack of respect toward each other and that lack of friendly relationship necessary to maintain a harmonious and agreeable state of family life, but is wanting in the elements constituting cruel and inhuman treatment. It seems that they have been equally at fault in failing to perform their full marital duties. The trial court, who saw the parties while testifying to their tale of woe, believed that neither had been guilty of acts amounting to cruel treatment. Giving due weight to this conclusion of the trial court, we cannot say that the judgment is not fully supported by the record.

By the Court.—Judgment affirmed.

KLAS, Respondent, vs. KUEHL, Appellant.

January 12—February 9, 1915.

Trial: Special verdict: Denial, when error: Demand before introduction of evidence: Letting farm on shares: Failure to plow: Excuses: Division of produce: "Fruit:" Increase of "stock."

1. Where there are several material controverted issues raised by the pleadings it is error to deny a seasonable request for a special verdict.
2. A request by defendant for a special verdict, made before he has introduced any evidence, is seasonably made under sec. 2858, Stats.
3. An admission, in the nature of a concession for the purpose of narrowing the issues, made by defendant before demanding a special verdict was not the introduction of evidence on his behalf within the meaning of sec. 2858, Stats.
4. Error in refusing to submit a special verdict cannot, upon the record in this case, be said to have been nonprejudicial.
5. Where, in the lease of a farm upon shares, the lessee agreed that when he left at the end of the term he would leave a certain number of acres plowed, evidence that because of bad weather he did

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not have time to do the plowing before the termination of the lease and that thereafter he was refused the use of the lessor's horses to do the plowing did not show any legal excuse for failure to perform; and the admission of such evidence was prejudicial error.

6. So, also, refusal to instruct the jury that the lessor was entitled to reimbursement for such failure to plow was prejudicial error.

7. Strawberries and grapes are "fruit" within the meaning of a lease of a farm upon shares.

8. Under a lease of a farm upon shares, providing that the lessor should place not less than twenty-five cows on the farm and not less than eight horses for working purposes, that "said stock and horses" should be and remain his property, and that he should have two thirds, and the lessee one third, of the increase of stock, a catch colt foaled by one of the working horses was not "increase of stock."

APPEAL from a judgment of the county court of Dodge county: C. W. LAMOREUX, Judge. *Reversed.*

This action was brought upon a written contract entered into between the parties for the leasing of a farm and division of product. Under the terms of this lease the plaintiff was to work the defendant's farm of 282 acres upon shares, plaintiff to have one third and the defendant two thirds. The plaintiff claims that the defendant breached the lease by collecting money on sales of produce and refusing to pay plaintiff his portion; and further that the defendant took certain personal property and increase of stock belonging to plaintiff, and that plaintiff performed work on the farm at the defendant's request for which defendant refused to pay, making an aggregate claim by plaintiff of over $300.

The defendant answered admitting the execution of the lease and that the plaintiff took possession under it, and denied certain allegations of the complaint, and made certain claims against the plaintiff growing out of the lease, and also set up a counterclaim alleging failure to perform conditions on the part of the plaintiff, among others that the plaintiff agreed to leave 120 acres plowed at the expiration of the lease, and that he plowed only eighteen; that defendant was damaged thereby in the sum of $153, and that the defendant

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sustained other damages in consequence of the breach of the contract in various sums aggregating over $300.

The plaintiff seasonably moved for a reference, which was denied. The action was tried in the county court of Dodge county and a general verdict rendered in favor of the plaintiff assessing his damages at $181.11.

The defendant moved for a new trial upon several grounds which was denied. Judgment was entered in favor of the plaintiff on the verdict, from which this appeal was taken.

The principal errors relied upon for reversal are (1) that the court erred in refusing to direct the jury to find a special verdict as requested by the defendant; (2) the court erred in admitting evidence; (3) error in refusing to instruct the jury as requested by the defendant.

For the appellant there was a brief by *Burke & Lueck,* and oral argument by *A. W. Lueck.*

C. M. Davison, for the respondent.

KERWIN, J. 1. The defendant moved for a special verdict, which was denied and the case submitted on a general verdict. This court has repeatedly ruled that when a special verdict is seasonably demanded the party demanding it is entitled to have it submitted as a matter of right and that it is error to refuse it. *Schumaker v. Heinemann,* 99 Wis. 251, 74 N. W. 785; *Gatzow v. Buening,* 106 Wis. 1, 81 N. W. 1003; *Pearson v. Kelly,* 122 Wis. 660, 100 N. W. 1064; *Schliesleder v. Milwaukee E. R. & L. Co.* 147 Wis. 668, 134 N. W. 144; *Tobin v. Nichols,* 156 Wis. 235, 145 N. W. 659.

Where there are several material controverted issues raised by the pleadings it is error to refuse a special verdict. *Tobin v. Nichols, supra.* Counsel for respondent attempts to escape the error in refusing to submit a special verdict on the ground that there was but one controverted issue and that the appellant did not seasonably move for a special verdict, and further that if error were committed it was not prejudicial.

There is no doubt from the record but that there were sev-

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eral controverted material issues raised by the pleadings, hence the defendant was entitled as matter of right to a special verdict. But it is argued that the request was not seasonably made. The request was made before the introduction of any evidence in defendant's behalf. This was sufficient and seasonable under the statute. Sec. 2858, Stats.

It appears from the record that after plaintiff rested and before appellant demanded a special verdict he made a certain admission, and it is claimed that this admission was the introduction of evidence, after which it was too late to demand a special verdict as matter of right. The contention is untenable and exceedingly technical. The admission was not the introduction of evidence on the part of defendant within the meaning of the statute, but rather in the nature of a concession for the purpose of narrowing the issues.

The claim that the refusal to submit a special verdict was not prejudicial is not well made. It is clear from the record that there were several material controverted issues submitted to the jury, and the defendant was entitled, as matter of right, to have these issues submitted to the jury by appropriate questions, and it cannot be said upon the record in this case that the defendant was not prejudiced by refusal to submit the special verdict.

Counsel for respondent relies upon certain language of this court in *Gatzow v. Buening,* 106 Wis. 1, 81 N. W. 1003, to the effect that refusal to submit a special verdict is not ground for a new trial if substantial justice has been done. An examination of that case will show that it is not authority for respondent's contention here. The court merely held that the court was not bound on request for a special verdict to submit questions covering uncontroverted facts. *Gatzow v. Buening, supra,* at p. 17.

2. The lease in question contains the following provision:

"Whereas, there is about one hundred and twenty (120) acres now plowed upon said farm above described; it is agreed

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when the lessee leaves said farm at the termination of this lease, that he will leave plowed one hundred and twenty (120) acres thereof."

The plaintiff left the farm at the termination of the lease with only eighteen acres plowed, leaving one hundred and two acres unplowed. The defendant claims $153 damages for this. The plaintiff pleaded no excuse for this breach. On the trial the plaintiff was permitted to put in evidence, against the defendant's objection and exception, that he did not have time to do the plowing before termination of the lease on account of bad weather, and that defendant refused to allow him to take defendant's horses to do the plowing after termination of the lease.

This and other evidence of similar character was clearly inadmissible and prejudicial. The contract expressly provided that the plowing was to be completed at the time of the expiration of the lease. The evidence admitted furnished no legal excuse for failure to perform the contract and was well calculated, and doubtless did, influence the jury to the prejudice of the defendant. The plaintiff was bound under the contract to perform as agreed. *Williams v. Thrall,* 101 Wis. 337, 76 N. W. 599; *Vogt v. Hecker,* 118 Wis. 306, 95 N. W. 90; *Cook v. McCabe,* 53 Wis. 250, 10 N. W. 507.

3. The court refused to instruct the jury as requested by defendant to the effect that defendant was entitled to be reimbursed from the plaintiff for the 102 acres which plaintiff failed to plow in accordance with the provisions of the lease. This was prejudicial error.

Counsel for defendant also requested the court to instruct the jury to the effect that strawberries and grapes are fruit within the meaning of the lease. The requests were refused. We think it clear that these requests should have been given. Grapes and strawberries are ordinarily understood to be fruit and are so defined by lexicographers. Standard Dict.; Webster, New Internat. Dict. Whether strawberries and grapes

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are fruit within the terms of the lease was material in determining the respective claims of the parties under the lease.

4. Error is also assigned for refusal to give the following instruction:

"I instruct you as a matter of law that the colt for which the plaintiff claims his share is not increase of stock within the meaning and terms of the lease and that the plaintiff is not entitled to reimbursement from the defendant for one third thereof."

This colt was foaled from one of the eight horses furnished by defendant on the farm for work. Upon this point the lease provided:

"The said lessor shall stock said farm to such extent as he desires, but he shall place not less than twenty-five cows on said farm and not less than eight horses for working purposes. Said stock and horses shall be and remain the exclusive property of the lessor. The lessor shall have two thirds of all increase of stock, and of all produce, such as milk and butter, and the said lessee shall have one third of all increase of stock, such as milk and butter."

The evidence shows that the colt referred to is what is called a catch colt. The mother was a draft mare, a bronco, and the father half-bronco. Nothing was paid for the services of the father of the colt.

Whether the colt was "increase of stock" within the meaning of the lease is involved under the request to charge now considered. Under some circumstances it may well be that horses might be classed as "stock," but under the lease in question we think they were not so intended by the parties. The lease provides for cows and horses on the farm, not less than twenty-five cows, and eight horses for working purposes. The horses were furnished for work, not for breeding. Besides, the lease refers to the cows and horses as stock and horses, thus distinguishing the horses from stock. So we think the parties to the lease understood increase of stock to

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refer to increase from cows only. *Dudley v. Deming,* 34 Conn. 169.

It follows that on account of the errors committed the judgment must be reversed.

By the Court.—Judgment reversed, and cause remanded for a new trial.

MURPHY, Appellant, vs. BALDWIN and wife, Respondents.

January 13—February 9, 1915.

Trial by court: Admission of incompetent evidence: Refusal to consider it: Loan of credit to pay secured debt: Subrogation.

1. **In an equity case, after incompetent testimony had been admitted, it was entirely proper for the court to announce that it would not consider such testimony and to refuse to receive further evidence of like character.**
2. **A finding in this case that defendant did not promise to give plaintiff security for his indorsement of defendant's note is *held* to be sustained by the evidence.**
3. **One loaning money or credit to pay a debt of the borrower secured by a mortgage or otherwise, is not entitled to subrogation if there was no promise to give him security, even though he in good faith believed he was to receive security. *Stewart v. Stewart,* 90 Wis. 516, distinguished.**

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

During the fall of 1906 the defendant *H. W. Baldwin* was indebted in the sum of about $10,000. Of this amount he owed $5,000 to the Citizens National Bank of Green Bay, secured by mining and oil stocks; about $2,500 to the Building & Loan Association of Green Bay, which was secured by two mortgages on his homestead; and about $2,500 in floating indebtedness. He desired to concentrate his indebtedness, and about December 1st applied to the plaintiff for a

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loan of $10,000 for the purpose of paying his then creditors. He told plaintiff that he would turn over to him as security for the loan the securities then held by the bank, and that if these were not considered sufficient he would give a mortgage on his house. Plaintiff stated he would consider the matter, and in a few days advised *Baldwin* that the bank was willing to carry the loan which it held and did not care to have it disturbed. *Baldwin* stated that if such was the case he need borrow only $5,000, and asked plaintiff to indorse his note for this amount, which plaintiff did. *Baldwin* testified that nothing was said about his giving any security on this occasion, while plaintiff testified to the contrary. Defendant's note, indorsed by plaintiff, was discounted, and plaintiff was obliged to pay it. Of the money secured on the note, the sum of $2,542 was used in paying the mortgage indebtedness held by the building and loan association on *Baldwin's* home.

This action was brought by the plaintiff to set aside the satisfactions of the mortgages referred to and to revive the same and to subrogate the plaintiff to the rights of the mortgagee prior to the payment of the indebtedness to the building and loan association and to foreclose such mortgages, to the end that plaintiff might recover, through a sale of the mortgaged premises, the sum of $2,542 and interest in partial payment of the indebtedness due him.

Among other things the court found that the $5,000 note was indorsed by the plaintiff at *Baldwin's* request, for the express purpose of assisting *Baldwin* in getting the necessary money to pay off the mortgages on his home, and that the sum of $2,542 received on the note was so used. The court further found that neither of the defendants agreed to give plaintiff any security for his indorsement.

As conclusions of law the court found that plaintiff was entitled to a money judgment only against *H. W. Baldwin* for the amount paid on the note and interest, and that the wife, *Anna C. Baldwin,* was entitled to judgment dismissing

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the complaint. Plaintiff appeals from the judgment entered in accordance with the findings of fact and conclusions of law.

For the appellant there were briefs by *James H. McGillan,* attorney, and *Greene, Fairchild, North, Parker & McGillan,* of counsel, and oral argument by *James H. McGillan.*

For the respondent there was a brief by *Martin, Martin & Martin,* and oral argument by *Joseph Martin.*

BARNES, J. This case has been well briefed and ably argued at the bar, and the learned circuit judge has favored us with a terse and lucid opinion setting forth his views.

The errors assigned are: (1) The court excluded testimony which should have been received. (2) The court should have found as a fact that *Baldwin* agreed to give plaintiff security for his indorsement. (3) The court should have held as a matter of law that plaintiff was entitled to subrogation, regardless of any promise to give security. (4) The court should have held that plaintiff believed in good faith that he was to receive security for his indorsement, and in such a case he was entitled to be subrogated to the rights of the creditor whose debt he paid.

1. On the trial plaintiff sought to prove by the cashier of the bank where the indorsed note was discounted that plaintiff informed him that he expected to be secured for his indorsement. The evidence was excluded. Questions were asked which pertained to the time at which the transaction took place as well as to a later period. There was no pretense that *Baldwin* was present at any of these conversations. All such evidence was held to be incompetent because self-serving and hearsay. It is not claimed that the evidence was competent unless made so by certain questions asked of plaintiff on cross-examination and on redirect. He testified on cross-examination that he told the bank directors that he was to have mortgage security for his indorsement. This evidence related to

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a time long after the note was indorsed. On redirect examination he testified that he made such a statement about the time the bank took the note. The court said that it would eliminate all this testimony from consideration in deciding the case. We think it was entirely proper for the court to say that it would not consider incompetent testimony that had been admitted and that it would not receive any more evidence of a like character. In effect, though not in form, the court struck out the incompetent evidence that had been admitted. It would, we think, be a surprise to the profession to learn that in the trial of equity cases, where great latitude is often allowed in offering evidence, the court, once having admitted incompetent testimony without objection, could not decline to consider it.

2. The finding that there was no promise to give security cannot be disturbed. The statement of *Baldwin* about giving security was made when he sought to borrow $10,000 from the plaintiff. A different arrangement was made at a later date, and *Baldwin* says he did not agree to secure the plaintiff on his indorsement. The principal witnesses were plaintiff and *Baldwin*. The condition of the evidence was such that a finding either way upon it would not be disturbed by this court. We are not satisfied that the trial judge proceeded on any erroneous theory in reaching a conclusion on the facts.

3. The main question in the case arises on the contention that on the facts found plaintiff was entitled to subrogation. Decisions can be found both ways on the proposition. On the one hand it seems equitable enough, where money or credit is borrowed to enable a debtor to pay a mortgage, and this fact is known to the parties and it is so used, that the party who in fact pays the debt should be placed in the shoes of the creditor who has been paid. On the other hand, it is a maxim of equity that it aids the diligent. The plaintiff was in a position where he might have exacted security if he desired

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it. If he could not obtain it, he might withhold his indorsement. Not having done what prudence would dictate, should a court of equity supply a remedy to relieve him of the result of his carelessness? We think the question has been answered adversely to the plaintiff by the decisions of this court. It is difficult to see wherein the plaintiff is in any different or better position than he would have been had he loaned the money outright instead of indorsing defendant's paper. This court is committed to the doctrine that in the case of a loan of money or credit unaccompanied by a promise to give security, no right of subrogation exists, even where it is understood that the money is to be used in paying a secured debt. *Downer v. Miller,* 15 Wis. 612; *Watson v. Wilcox,* 39 Wis. 643. The rule of these cases is approved in *Wilton v. Mayberry,* 75 Wis. 191, 43 N. W. 901. The case of *Downer v. Miller* is exactly in point, in that it holds that a party loaning his credit to pay an existing indebtedness is not entitled to subrogation in the absence of an agreement to give security. Had the plaintiff been obliged to pay the mortgages to protect some lien of his own on the mortgaged property, or had the debtor agreed to give security on the mortgaged property, or had the plaintiff been a surety for the payment of the mortgage debt, then the right of subrogation would follow. *Wilton v. Mayberry, supra; Hughes v. Thomas,* 131 Wis. 315, 111 N. W. 474; *Downer v. Miller, supra; Poluckie v. Wegenke,* 137 Wis. 433, 119 N. W. 188. The doctrine of the cases cited is not shaken by *Carey v. Boyle,* 53 Wis. 574, 11 N. W. 47, which involved the existence of a purchase-money lien rather than a right of subrogation, nor by *Hughes v. Thomas, supra,* where there was an agreement to give security.

4. The point is made that the plaintiff in good faith believed when he indorsed the note that he was to receive security, and under the doctrine of *Stewart v. Stewart,* 90 Wis. 516, 63 N. W. 886, he was entitled to subrogation for this reason. The facts in the two cases are entirely dissimilar.

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In *Stewart v. Stewart* the mortgage was paid in good faith, the payors believing that they owned the title to the mortgaged property, and it was held that as against the true owners, who received the benefit of the payment, such payors should be subrogated to the rights of the mortgagee whose mortgage they paid. Here there is no element of mistake. The court found on sufficient evidence that there was no agreement to give security, and, accepting this finding as a verity, there is no ground for applying the rule of the *Stewart Case.*

By the Court.—Judgment affirmed.

DISHMAKER, Respondent, vs. HECK, Appellant.

January 13—February 9, 1915.

Automobiles: Collision: Wilful act: Instructions to jury: Mistake of fact: Duty of counsel: Immaterial errors: Jurors: Qualification: New trial: Communication between court and jury: Mistaken ideas of jurors: Affidavits to impeach verdict.

1. If the trial court was mistaken in stating to the jury that it was agreed by counsel that there was no evidence that the accident in question occurred otherwise than in one of two ways, it was counsel's duty to call attention to the mistake at once, so that it could be corrected.
2. Where, in such case, there was in fact no evidence that the accident occurred otherwise than as stated, it was immaterial whether there had been an agreement between counsel to that effect or not.
3. Where a question submitted to the jury asked whether defendant wantonly, wilfully, and maliciously ran his automobile against that of plaintiff, and the jury were correctly charged that if the accident happened in the way claimed by plaintiff the only conclusion to be drawn was that defendant wilfully and wantonly committed the act, there was no need for any abstract instruction on the subject of gross negligence.
4. In an action based on a collision between automobiles driven by rival dealers, a juror stated on his *voir dire* that he had dealt

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with plaintiff but that he owed him nothing, that he owned no car, and that he was not negotiating with plaintiff for a car. It afterwards appeared that before the trial the juror had ordered a car from plaintiff and that it was delivered and paid for immediately after the rendition of the verdict. *Held* that, the statements of the juror being literally true and the trial court being satisfied that he was competent and fair, there was no error in refusing a new trial.

5. All communications between the court and the jury should be in the open court room and free from any suspicion of secrecy. But where the jury, after retiring, were unable to decipher a word in the special verdict, and the foreman, returning into open court, asked the meaning of the word, to which the trial judge replied, "punitive, by way of punishment,"—the proceedings being taken down by the official reporter,—there was no prejudicial error.

6. Affidavits of jurymen to the effect that after the foreman returned to the jury room and announced that the word was "punitive" there was discussion as to what would become of the punitive damages if any were awarded, the foreman and others contending that they would be paid to the county, and that, although the foreman did not represent that the court had given him any instructions on the subject, some of the jurymen believed that he was stating what the judge had told him, and that they would not have awarded punitive damages if they had known that such damages would go to plaintiff—were not admissible to impeach the verdict.

APPEAL from a judgment of the circuit court for Kewaunee county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

Action for damages resulting from a collision of two automobiles. The parties were rival dealers in automobiles. The plaintiff, driving a Ford runabout, in which he and his eleven-year-old son were seated, was approaching Kewaunee and going up a long hill, called Lutien's hill, in the outskirts of the city. The defendant, driving an E. M. F. automobile in which beside himself were his wife, daughter, and two other ladies, was just ahead of the plaintiff, going in the same direction. As they neared the top of the hill the plaintiff drew out to the left of the defendant and attempted to pass him. When the plaintiff's car came up with the defendant's car

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there was a collision, as a result of which the plaintiff's car was somewhat injured and pushed into the ditch, the plaintiff shaken up, and his son thrown out of the car. According to the testimony of the plaintiff and his son, the defendant saw the plaintiff's car coming up and purposely turned the front wheels of his own car into the plaintiff's car. According to the testimony of the defendant and the two ladies who were with him, he did not see the plaintiff at all before the collision and the plaintiff ran his car into the defendant's car.

The complaint contained two causes of action, one alleging negligence, the other wilful and malicious wrong. The court in its charge to the jury withdrew from their consideration the cause of action founded on negligence. The jury returned the following special verdict:

"(1) Did the defendant wantonly, wilfully, and maliciously run his automobile upon and against plaintiff's automobile while the plaintiff was attempting to pass defendant on July 10, 1912? *A.* Yes.

"(2) If your answer to the first question should be 'Yes,' then answer this: At what amount do you assess the plaintiff's compensatory damages resulting directly from the collision between the two cars? *A.* One hundred ($100) dollars.

"(3) If your answer to the first question should be 'Yes,' then answer this question: What amount if any do you assess, in addition to compensatory damages, for punitive damages? *A.* Five hundred ($500) dollars."

A motion for a new trial was made, based on alleged errors in the admission of evidence and in the charge of the court, as well as upon misconduct of the jury. The motion was overruled and judgment entered for the plaintiff, from which the defendant appeals.

For the appellant there was a brief by *O. H. Bruemmer,* attorney, and *Nash & Nash,* of counsel, and oral argument by *E. G. Nash.*

For the respondent there was a brief by *Minahan & Minahan,* and oral argument by *Eben R. Minahan.*

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WINSLOW, C. J. The errors alleged will be treated in their order.

1. The court told the jury in the opening of the charge that plaintiff's contention was that the defendant suddenly turned his steering wheel and ran into the plaintiff, while defendant's contention was that plaintiff's car struck defendant's car on the side without defendant's fault, and that it was agreed by counsel and the court that there was no evidence showing that the accident happened in any other way than in accordance with one of these two contentions. This is now complained of by the defendant, and affidavits were introduced tending to show that the defendant's counsel made no agreement of that kind. There are two sufficient answers to this claim: *first,* if the statement was incorrect it was a mistake of fact which the trial court innocently made, and it was counsel's duty to call attention to it at once in order that it might be corrected; *second,* whether there was any such agreement or not is quite immaterial, because the situation of the case was exactly as the court stated, and hence it made no difference whether there had been an agreement between counsel to that effect or not. In this connection the court also said to the jury:

"There is nothing showing that the collision happened in any other way than either that which is claimed by the plaintiff or that which is claimed by the defendant; and it is also conceded that if the claim of the plaintiff is correct in theory, that the accident did happen as they claim, that *Mr. Heck* did what he did, the only conclusion drawn from that is that he wilfully, intentionally, and maliciously ran his car against that of the plaintiff. So that is the meaning of the question, Did the defendant wantonly, wilfully, and maliciously run his automobile upon and against the plaintiff's automobile while the plaintiff was attempting to pass the defendant on July 10, 1912?"

Complaint is made of this instruction in that it does not give the jury any adequate guide on the subject of gross neg-

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ligence. There does not seem to have been any necessity for any abstract discussion of gross negligence in the case. The question concerning which the judge was giving instruction asked the jury whether the defendant wantonly, wilfully, and maliciously ran his automobile against the plaintiff's car, and the judge told the jury in effect that if the accident happened as the plaintiff claimed that it did the only conclusion to be drawn was that the defendant wilfully, intentionally, and maliciously committed the act. We have examined the evidence and are satisfied that this statement was entirely true. If the plaintiff's story was true, the defendant's act was necessarily deliberate and wilful.

2. The claim is made that the verdict is against the overwhelming weight of the evidence and that there was no evidence justifying the recovery of punitory damages. These contentions, as well as the contentions that prejudicial errors were made in the rulings on evidence and in certain parts of the charge other than those already referred to, must be overruled. It is not thought that these claims are sufficiently important or serious to require detailed treatment.

3. One Wochos, one of the jurors, when examined as to his qualifications to act as a juror in the case, stated that he had dealt with the plaintiff's firm, Dishmaker Bros., at various times, that he owed *Mr. Dishmaker* nothing at the time, that he owned no car, and that "he was not negotiating with *Mr. Dishmaker* for a car." Upon motion for new trial it appeared that Wochos had on January 2, 1913, ordered a Ford car of the plaintiff's firm, to be delivered on or about May 6th, for which he was then to give his notes for $625; that the trial began May 13th and closed by the bringing in of a sealed verdict May 16th; that the car had not been delivered at the time of the trial, but was delivered on May 16th, after the rendition of the verdict, and the purchase price paid in cash. The answers of the juror upon the *voir dire* seem to have been literally true. He might well have given fur-

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ther information, but he stated nothing falsely. The trial court was satisfied that the juror was competent and fair and states that he was very desirous of being excused from serving on the case. We are unable to say that there was any error here.

4. After the jury had retired to deliberate they found themselves unable to decipher the word "punitive" in the last question of the special verdict. The questions were in the handwriting of the circuit judge, and the incident seems to show that he possessed, among the many other qualities of a learned lawyer which all concede to him, the quality of poor penmanship. In this dilemma the jury deputed their foreman to go into the court room and find out what the troublesome word might be. The foreman went up to the bench, another case being on trial, laid the paper before the judge, and asked the meaning of the word, to which the judge replied, "punitive, by way of punishment," and the foreman then returned to the jury room and announced to his fellow jurors that the word was "punitive." The proceedings in the court room were conducted in an ordinary tone of voice and were heard and taken down by the official reporter.

We see no prejudicial error here. No court has been more careful than this court in insisting that all communications between the court and the jury should be in the open court room and free from even a suspicion of secrecy (*Havenor v. State*, 125 Wis. 444, 104 N. W. 116; *Dralle v. Reedsburg*, 135 Wis. 293, 115 N. W. 819), but it seems that it would be little less than absurd to hold that because the trial judge correctly told a juryman what a given word in the special verdict was and what it meant there should be a new trial of the case. Such a holding would seem to be almost an affront to good sense.

5. It appears by affidavit of several jurymen that after the foreman's return there was discussion among them as to what would become of the punitive damages in case any were

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awarded, the foreman and others contending that they would be paid to the county. It is not claimed that the foreman represented to his fellow jurymen that the judge had given him any instructions on the subject, but it is claimed that some at least of the jurymen believed that the foreman in taking this position was stating what the judge had told him and that they would not have awarded any punitive damages if they had known that such damages would go to the plaintiff.

Had the foreman represented that the judge had given him such instructions, the affidavits of jurymen might probably be competent evidence of that fact and of the effect which the supposed instructions had upon the deliberations of the jury (*Dralle v. Reedsburg, supra*), but in the absence of any representation of this kind such affidavits cannot logically be held admissible. Any such rule would place every verdict at the mercy of weak or corrupt jurymen. If verdicts were to be set aside because of the erroneous ideas of some of the jurymen as to its effect or because of fallacious or untrue arguments or statements made by one juryman to his fellow jurymen in the course of their deliberations, few verdicts would ripen into judgments. Such is not the law. *Wolfgram v. Schoepke,* 123 Wis. 19, 100 N. W. 1054; *Imperio v. State,* 153 Wis. 455, 141 N. W. 241.

By the Court.—Judgment affirmed.

GILLETT, Administrator, Appellant, vs. FLANNER-STEGER LAND & LUMBER COMPANY, Respondent.

January 13—February 9, 1915.

Trial: Questions for jury: Master and servant: Death from falling tree: Negligence: Evidence: Sufficiency: Excessive damages: Appeal: Review: Failure to make proper motions.

1. In submitting a case to the jury the trial court decides, as matter of law, that the evidence will warrant findings in plaintiff's favor of the facts essential to a recovery.

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2. In an action for death of a woodsman who, while engaged with others in opening up a logging road, was killed by a tree felled by another of the crew, findings of the jury to the effect that defendant was actionably negligent in permitting the work to be done as it was without the giving of proper warnings are *held* to be sustained by the evidence, although the trial court ruled to the contrary.
3. An award of $4,625 for death of a workingman fifty-nine years old and capable of earning about $400 per year being deemed clearly excessive, although the question was not raised by defendant, this court, under sec. 2405*m*, Stats., remands the cause for a new trial unless plaintiff elects to take judgment for $3,000. SIEBECKER and KERWIN, JJ., dissent.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

Action to recover compensation for the death of plaintiff's intestate. On the 1st day of November, 1912, the deceased with others, working under a foreman, was in the employ of defendant and engaged in opening up a logging road. All were experienced woodsmen. The particular trees to be removed had been blazed. The removal was being accomplished, mainly, by cutting the roots close to and under the surface of the ground. Each of several employees selected his particular working place. The direction of the wind was from east to west, causing the trees to fall west. One Sieck was working at the most westerly tree. The deceased was working at one some thirty-five or forty feet east of Sieck's tree. The underbrush had been cut away so the men were in sight of each other. Sieck's tree was a tamarack. The foreman depended on the men to watch out for themselves as regards being struck by falling trees, though they were admonished to be careful. As Sieck was about to finish his tree by cutting away a tap root the foreman came upon the scene. His being there was not for the purpose of giving warning of danger. It just happened that, in his rounds, he came there at the particular time. He took no special notice of Sieck's operation as he was finishing his tree. It commenced to fall rather prematurely and to the east, though Sieck's purpose

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was to drop it the other way. There was evidence tending to prove that it took the unexpected direction and commenced to fall quicker than expected by reason of a sudden gust of wind from the west. As soon as the foreman observed what was about to happen, he called out the danger but too late for deceased to seek a place of safety. The tree fell toward him. He started to run. It overtook him causing his death. There was evidence to the effect, or tending to prove, that, where the men were at work sudden changes of wind were liable to occur. The prevailing direction on the particular occasion was from east to west and the cutting was being done so as to drop the trees accordingly. The particular tree was sixteen to twenty inches through and sixty to seventy-five feet high. The roadway was in a ravine. The ground raised up quite high to the right and left. There were changing gusts and puffs of wind occasionally. That was not unusual. Sieck commenced the finishing strokes with his ax without giving warning. One way to control the direction of a tree in such circumstances is to push it about as it is ready to fall. Another way is to cut the roots close on the side towards which it is desired to fall the tree. The proper manner of conducting operations was familiar. It was obvious that deceased was in a place of danger in case of the tree falling in his direction. Nothing by way of pushing the tree was done or giving warning, until the tree commenced to fall. No rule was promulgated in reference to falling trees, as aforesaid, though the men were charged to be careful. The conditions were all obviously favorable for sudden changes of the wind, and trees falling in a different direction than was calculated on. It was difficult to calculate, with reasonable certainty, as to the direction any tree would fall unless some manual force was applied thereto. Danger could readily have been obviated by pushing or by not allowing one man to work within range of a tree another was engaged in dropping. It is customary, in such circumstances, for the man who is dropping a tree to give warning when it is about to fall.

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The court submitted the cause to the jury, resulting in these findings of fact: Defendant was negligent in permitting the work to be done as it was performed. A man of ordinary care ought reasonably to have apprehended danger of injuring workingmen. Such negligence was the proximate cause of the accident. It was negligence to permit the work to be done without requiring men to push the trees in the direction they were desired to fall. A man of ordinary intelligence ought reasonably to have apprehended that such was necessary to avoid danger of injuring workmen. Failure to do that was a proximate cause of the accident. Sieck was negligent, in cutting the tree as he did, without giving warning to men in the vicinity. A man of ordinary intelligence ought reasonably to have apprehended it was dangerous to workmen in the vicinity to do so. Such negligence was a proximate cause of the accident. The foreman was negligent in not giving reasonable warning of the imminence of the fall of the tree and his failure to do so was a proximate cause of the accident. The deceased was not guilty of contributory negligence.

Before submitting the cause to the jury the court intimated that he did not think a cause of action was established. That was not in the presence of the jury. After verdict, on the motion for change of answers, the court stated that before submitting the cause to the jury he was of the opinion that plaintiff had failed to make out a cause of action, but thought he would take the verdict of the jury and then act upon it, in case of its not being what he thought it should be; that in his opinion the answers to all the questions convicting defendant of actionable negligence, were contrary to the evidence. He therefore changed such answers so as to favor defendant, and ordered judgment dismissing the complaint with costs. Judgment was so rendered.

For the appellant there was a brief by *Martin, Martin & Martin,* and oral argument by *P. H. Martin.*

For the respondent there was a brief signed by *Robert R.*

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Freeman, attorney, and *Henry J. Bendinger* and *Timothy Brown,* of counsel, and oral argument by *Mr. Freeman.*

MARSHALL, J. The court in submitting the cause to the jury, decided that there was room in the evidence to find the facts as they were found. Whether there was such room or not was a question of law. It was for the court to decide that before calling upon the jury to determine, as matters of fact, between conflicting inferences. With the judgment of the court for their guidance, it was most natural for the jury to take, as a verity, that there was room in the evidence for plaintiff to recover. They did so and rendered an honest and reasonable verdict, if the court gave the proper decision as to the law. They, naturally and properly, apprehended there was evidence warranting a finding either way. Whether the court decided at last, that there was no reasonable basis for the jury's verdict, in any reasonable view of the evidence, does not clearly appear.

On the whole, the decision of the trial judge does not possess the persuasiveness ordinarily to be accorded to a consistent and positive determination that the evidence does not, in any reasonable view, support the jury's determination. Therefore, it seems that there is little, if anything, in the court's decision below to impeach the verdict. So we incline to the view that there was a case for the jury, as the trial court, so far as they could have understood the matter, deliberately decided, and that judgment should have been rendered accordingly.

Whether the verdict was excessive or not, because of the course the case took, was not passed upon. Deceased was a common workingman. He was capable of earning about $400 per year. He was fifty-nine years of age. The recovery could not, properly, go beyond the reasonable expectation of pecuniary benefit from his life which the wife was deprived of by his untimely taking away. A recovery, in such

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a case, under the Workmen's Compensation Law would be about $1,600. Assuming that the earnings which would have gone to the wife each year during her husband's expectancy of life, would have been $250 per year, which would be quite a large estimate, $2,775, at the time of the trial, would have been a full equivalent, based on what it would have taken to purchase an annuity for her of $250 per year during such expectancy. His total earnings, had he lived, would not have exceeded $5,518, and the present worth would not exceed $2,500. Four thousand six hundred and twenty-five dollars for damages to the wife is clearly excessive; but there was no motion to set aside the verdict on that ground, nor for a new trial because it was contrary to the evidence. On the record, defendant made no complaint except as to the findings on the subject of negligence. If it were not for sec. 2405*m*, Stats., there would be no way, under established practice, to remedy the difficulty. It is probable, counsel for plaintiff were misled by the circuit judge into supposing that there was practical certainty of relief from the verdict by motion to set aside answers as to negligence and so the ordinary motions to reach excessiveness in the verdict were omitted. The confidence as to the trial court was not misplaced, and now respondent is left in a very poor predicament, unless relief can be accorded under the beneficent law referred to.

The statute provides that the court, for the purpose of preventing a miscarriage of justice, may control the situation regardless of inadvertences or mistakes or misjudgments of the court or counsel, and may, regardless of whether proper motions, objections, or exceptions were taken or not, in case of a reversal, direct the proper judgment, or remand the cause for a new trial as shall be deemed necessary to accomplish the ends of justice. In view of that, it is considered that we ought, instead of remanding the case for judgment on the verdict as rendered, send it back with permission to the plaintiff to elect, within twenty days after the filing of the *remitti-*

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tur in the trial court to take judgment for $3,000 and costs, or a new trial on the question of damages only.

By the Court.—The judgment is reversed, and the cause remanded with directions as indicated in the opinion.

SIEBECKER and KERWIN, JJ., dissent from so much of the judgment as holds that the damages are excessive.

JONES and another, Respondents, vs. KEEFE, Appellant.

January 13—February 9, 1915.

Contracts: Parol evidence to vary writing: Sale of automobile: False representations: Warranty: Breach: Recoupment: Evidence: Pleading: Counterclaim.

1. Where a second-hand automobile was sold and delivered under a written contract, plain and unambiguous in its terms and containing a statement that there were no verbal understandings, promises, or agreements except those specified therein, parol evidence of representations as to the age and condition of the car, alleged to have been made by the vendors in negotiating the sale, was not admissible to vary the contract.
2. In an action upon a note given for the purchase price of an automobile which was "guaranteed" by the vendors for one year, the trial court properly held, as matter of law, that the evidence did not tend to show any breach of the warranty by neglect or refusal of the vendors to make such repairs as were required thereby.
3. An answer setting up a claim for recoupment of damages by reason of a breach of warranty of goods sold, is sufficient to raise the question of defendant's right to such damages, even though judgment therefor is not formally demanded by way of counterclaim.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

This is an action upon a promissory note given as a re-

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newal of two previous notes for the purchase price of an automobile and some items of charges for supplies.

The plaintiffs are copartners engaged in the automobile business in the city of Green Bay. The defendant is a farmer living in Brown county. In June, 1912, the plaintiffs sold the defendant a second-hand automobile for $650. The defendant paid $50 in cash and gave two notes, one for $200 and one for $400, due in thirty and ninety days respectively. The thirty-day note was renewed, and upon October 1st was combined with the ninety-day note and renewed. This latter note was renewed, and there were added to it certain charges against the defendant for gasoline and automobile accessories, making the note amount to $615. The defendant had made some small payments on the notes, but the payments had not equaled the interest and other charges. This note for $615 was made on November 1st and became due on December 1st. On demand of payment the defendant offered to make a small payment and renew, but the plaintiffs insisted on payment in full. The defendant then refused payment, claiming that the automobile was so defective and unfit for use that it did not comply with and fulfil the warranties made by the plaintiffs in their contract of sale. At the time of the sale by the plaintiffs to the defendant a written contract was entered into which in part stated: "It is mutually understood that this automobile is guaranteed by the West Side Garage for a period stated below. One year." The contract also contains the following: "It is understood and agreed that there are no verbal understandings, promises, or agreements made by any agent, salesman, or employee pertaining to this order that are not clearly specified therein."

The defendant by further answer to the complaint alleged by way of defense and by way of counterclaim that he purchased the automobile of plaintiffs; that the automobile was not in first-class condition and was only of the value of $300; that the defendant at the time of the purchase relied wholly

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upon representations made by the plaintiffs and that these representations were false; that defendant did not know them to be false and relied upon them and was thereby induced to purchase the machine. Further, that the written warranty entered into at the time of the sale has been breached, and that the defendant by these misrepresentations was damaged in the amount of $300. The defendant offered to permit the plaintiffs to take judgment for the sum of $250.

The circuit court excluded all evidence of representations which defendant alleges were made to him by plaintiffs and on which he relied in making the purchase of the car, upon the ground that the written contract contained all of the agreement and therefore the alleged warranties not contained in the contract were not to be considered as part thereof. The circuit court directed a verdict for the plaintiffs for the amount due on the note and awarded judgment in the sum of $658.50. From such judgment this appeal is taken.

For the appellant there was a brief by *Martin, Martin & Martin* and *G. F. Clifford,* and oral argument by *Mr. Clifford.*

For the respondents there was a brief by *Cady, Strehlow & Joseph,* and oral argument by *Samuel H. Cady.*

SIEBECKER, J. It is contended that the court erred in excluding evidence of the representations made by the plaintiffs respecting the age of the car and its fitness for use as an automobile. The purpose of the evidence was to show that the car, as to its condition and fitness for use, did not comply with the representations the plaintiffs made in this respect when the sale was negotiated. The parties to the written order for the car do not dispute that it was mutually accepted by them in making the sale and purchase of the automobile. By this writing the defendant agrees to purchase the car in question at the agreed price of $650, and pay this sum as stipulated. The order also contains the two agreements above stated,

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whereby the plaintiffs guaranteed the car for a period of one year and in effect stipulated that there were no verbal understandings, promises, and agreements not specified therein. It is clear from the evidence that the defendant accepted the car under this written order and that he gave his notes for the unpaid purchase price as therein specified and that the plaintiffs treated the order as the contract of sale and made delivery of the car pursuant thereto. The allegations of the answer, by way of defense and by way of counterclaim, in effect charge the plaintiffs with a breach of the contract of sale, in that the car does not fulfil the representation that plaintiffs made respecting its age and its condition and fitness for use as an automobile. The evidence which referred to statements not embraced in the terms of the written order was properly excluded by the court. The terms of sale were finally reduced to writing, and this excludes evidence of oral negotiations preceding it, if the terms are free from ambiguity. The contract terms are plain and definite in meaning when applied to the subject of the transaction and cannot be varied or modified by oral evidence. *Johnson v. Pugh,* 110 Wis. 167, 85 N. W. 641; *Newell v. New Holstein C. Co.* 119 Wis. 635, 97 N. W. 487. The clause of the contract that no verbal agreements were entered into not expressed in writing is expressive of the intent and purpose of the parties that all the terms and conditions of the sale are embraced in it. This stipulation supports the position that the negotiations were finally embodied in the written agreement.

It is contended that the court erred in holding that the evidence as a matter of law did not tend to show that there was a breach of the written warranty guaranteeing this automobile for a period of one year. The court interpreted this guaranty as warranting the car when sold to be in a condition fit for use and that it would run for a year, when used by the defendant in his business, as contemplated by the parties, with proper care and use, if the plaintiffs made the necessary

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repairs incident to such use. We find the record fully sustains the trial judge in holding that the evidence will not sustain a finding that the plaintiffs neglected or refused to make repairs of any defects in the machine which prevented the machine from running as contemplated in the guaranty. The defendant and his daughter make the naked statement that the car would not run, but this is wholly overcome by their own statements describing what use they actually made of it. Their complaint concerning the want of power is neutralized by their evidence, which shows they used it and that when they had any trouble in this respect it was remedied by the plaintiffs when brought to their attention. It is undisputed from the facts and circumstances shown that the defendant used the car, that it did run, and was operated in his business. It also appears that the plaintiffs did not fail to make such repairs as were required of them under the written guaranty.

The suggestion that defendant's pleadings are insufficient to raise these questions because the answer does not formally demand judgment by way of counterclaim is not well founded. The allegations of the answer must be given a liberal construction, and when so construed they sufficiently allege a claim for recoupment, if the evidence had shown that defendant sustained damages by reason of a breach of the contract of sale. *Manning v. School Dist.* 124 Wis. 84, 102 N. W. 356; *Steckbauer v. Leykom,* 130 Wis. 438, 110 N. W. 217; *Rib Falls L. Co. v. Lesh & M. L. Co.* 144 Wis. 362, 129 N. W. 595.

The action of the trial court by directing judgment for the recovery of the amount due on the note was correct because the evidence does not support the claim that plaintiffs in any way breached the contract of sale.

By the Court.—The judgment appealed from is affirmed.

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HENRY RAHR'S SONS COMPANY, Respondent, vs. BUCKLEY, Appellant.

January 13—February 9, 1915.

Landlord and tenant: Covenant or condition as to use of premises: Failure to use for purpose named: Re-entry: Wrongful exclusion of lessee: Damages.

1. **Words in a lease, "the said premises to be used for the purpose of hotel and saloon and bathing grounds," did not amount to a condition or covenant that the lessee would use the premises continually for the purposes named, and his failure to do so gave the lessor no right of re-entry under a provision that the lease should be void if the lessee should "use said premises, or any part thereof, contrary to the conditions" therein contained.**
2. **A lessee who has been wrongfully prevented by the lessor from using the leased premises for a portion of the term for which the rent has been paid, may recover their rental value for that portion of the term.**

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

The complaint in this action alleges that on the 2d day of March, 1911, the defendant leased to the plaintiff certain premises owned by him known as Harbor View, situated on the bay shore of Green Bay, near the city of Green Bay, for the term of one year from the 1st day of May, 1911, with covenant of peaceable and quiet enjoyment for said term, at an annual rental of $500, and also with option on the part of plaintiff to occupy said premises for three years' additional time, and that the defendant on the 1st day of July, 1911, unlawfully and wrongfully entered upon the premises and ejected the plaintiff therefrom and ever since has occupied the same and kept the plaintiff out of possession, to its damage in the sum of $1,000.

The lease in question is made a part of the complaint. The defendant answered admitting the execution of the lease and the corporate existence of the plaintiff, and denies every other allegation of the complaint, and sets up several separate defenses, among others that the plaintiff ran the property

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in an unlawful and illegal manner and on the 1st day of July, 1911, abandoned the premises; and for a further defense alleges in substance that the plaintiff is the owner of a resort near by the defendant's property known as Bay View Beach, and that plaintiff leased the defendant's property for the purpose of injuring the defendant's property and enhancing the value of its own. The defendant also sets up a counterclaim claiming damages on account of the bad reputation which the plaintiff gave the property in managing and running the same as an improper place, and asks damages in the sum of $1,000.

The plaintiff replied to the counterclaim denying the allegations thereof. The portions of the lease material in this case are as follows:

"
. . . . . .

"Witnesseth, that the party of the first part hath agreed and doth hereby agree to lease unto the said party of the second part, the following described premises, to wit: two acres in private claim forty-six (46) with all buildings thereon, known as Harbor View premises or Buckley's, and situated east of the grounds leased by John A. Cusick at Bay Beach, also including the following personal property: one cash register, twelve tables, three dozen chairs, three rustic benches, one cook stove, knives and forks, fifteen dozen bar glasses, three beds, three mattresses, three springs for bed, six pillows, three dozen chairs, one rug, one sideboard, two wash tubs, one cupboard, ten towels, three dozen bathing suits, two gasoline stoves, two burners for stoves, one dozen dishes, also including bath house.

"It is agreed that if so desired by the party of the second part, an extension of three additional years will be granted at the same rental.

"To have and to hold the same for the term of one year from the first day of May, A. D. 1911, at the rate of five hundred ($500) dollars per annum, payable in instalments of —— dollars monthly, in advance, the said premises to be used for the purpose of hotel and saloon and bathing grounds."

. . . . . .

"It is further understood and agreed, that if the party of the second part, or his assigns, shall fail to pay the rent at the

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times above stated, or shall use said premises, or any part thereof, contrary to the conditions herein contained, or shall wilfully or maliciously do injury to the same, this lease shall be void as to the party of the second part, and the party of the first part, or his legal representatives, shall be entitled to the immediate possession of said premises, without hindrance or delay, and to a recovery of all damages sustained by the acts of the party of the second part."

The case was tried by the court and a jury, and after the evidence was all in it was agreed between the parties that the jury should be discharged and that the case be submitted to the court for its decision upon the facts and the law. The court found that the plaintiff was entitled to recover. Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Minahan & Minahan,* and oral argument by *V. I. Minahan.*

For the respondent there was a brief by *Martin, Martin & Martin* and *G. F. Clifford,* and oral argument by *Mr. Clifford.*

KERWIN, J. The learned trial court below filed the following opinion covering the material questions in the case:

"The defendant owned the property in question. He had a license to sell liquor at retail in a building on the premises. The plaintiff is a brewing company. March 2, 1911, the defendant leased to the plaintiff, by written lease, said premises, the lease providing that the premises were to be used for the purpose of hotel and saloon and bathing grounds. The term was one year. The rent was $500 per annum in advance. The plaintiff took possession and paid the rent for the year, $500. The plaintiff put one Hunt in possession, under an agreement with him and *Buckley* that he should run the business under *Buckley's* license until July 1st, and pay rent to the plaintiff and obtain a license July 1st and continue to run the business and pay rent. Because Hunt ran his business so as to give the place a bad reputation the

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town board made it known to the parties that they would not give Hunt a license. *Buckley* was willing that the plaintiff should put any one in Hunt's place to whom the town would grant a license, and so informed the plaintiff. The plaintiff made no application for a license for any one. *Buckley* applied for a license, requesting the board to grant a license to any one for whom the plaintiff might ask it, and only to act upon his application in case no other application was made. A license was granted to *Buckley* July 1, 1911. He obtained it for the purpose of retaining the right to conduct or have conducted on said premises a saloon, without which right the rental value of the premises would not exceed $120 per year. The population of the town was 2,600. Including *Buckley's* there were twenty-six licenses in the town June 30, 1907. Hunt left the premises and delivered possession to the plaintiff by returning or handing to it the keys. July 1st *Buckley,* without plaintiff's permission, broke into the building and took possession of the property, and has conducted a saloon business on the premises ever since. The plaintiff asked a return of the possession. Defendant never returned any of the $500.

"Does the lease contain a condition that the lessor may enter and defeat it if the lessee fails to continually use the premises as a saloon?

" 'A condition . . . is a clause of contingency, on the happening of which the estate granted may be defeated.' 2 Bl. Comm. 299.

"The language used is to be strictly construed against forfeiture. A mere breach of covenant does not work a forfeiture or give a right of re-entry. *Bergland v. Frawley,* 72 Wis. 559, 40 N. W. 372. But if the lease also provides that if the lessee neglects or fails to perform and observe a covenant the lessor may lawfully enter and terminate the lease, the lessor has that right. *Wheeler v. Earle,* 5 Cush. 31; *Bergland v. Frawley,* 72 Wis. 559, 562, 40 N. W. 372. But

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the same rule of construction applies, when working out a condition from the two provisions, as when determining whether a certain provision constitutes a covenant or condition. So when there was a covenant to repair and a provision that 'if the lessee shall do or cause to be done any act, matter, or thing contrary to and in breach of the covenants of this lease,' it was held that failure to repair did not give a right to re-entry because it was not an act done contrary to the provisions. It was a mere failure to act as required.

"The clause in the lease in question relied upon as creating the condition and giving the right of re-entry is this:

" 'It is further understood and agreed that if the party of the second part shall use said premises or any part thereof contrary to the conditions herein contained, this lease shall be void as to the party of the second part, and the party of the first part shall be entitled to the immediate possession of the premises,' etc.

"The contention is that this provision, together with the language 'the said premises to be used for the purpose of hotel and saloon and bathing grounds,' give the right of re-entry and forfeiture. Unless the language quoted as to use amounts to a condition, it is not within the terms of the other provision quoted. If it is a condition, then it is such without the aid of the other provision making it so.

"But as there is nothing said relative to use of the premises in the lease aside from the words quoted, it may be that the document as a whole would require us to construe the language as referring to that quoted, but designating it by a wrong name. This is the most favorable view that can be taken of the language for the defendant. But it requires a covenant to use continually the premises for the purposes named. Is there such a covenant? That some meaning must be given to the language 'said premises to be used' will be conceded. Is it a covenant to use at all times during the term for the purpose named, or a designation of the purposes

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for which it may be used? If a covenant that will use for purposes named, note first it must be used for all three—'hotel and saloon and bathing grounds.' Note second, there is no limit as to time during the term. If ceasing to use for any one of the purposes for a short time would be a breach, it would be a breach also to cease using for either of the other purposes. It would not be claimed that the fact that no one bathed during the winter would constitute ceasing to use it for bathing purposes. But failure to furnish board and lodging for guests—failure to run a hotel—would be as much of a violation of the covenant as failure to run a saloon; and failure to keep open as hotel and saloon in one season of the year would be as much of a breach as failure to do so at another season. If this language amounts to a covenant or condition as to the lessee's use of the property, I think it merely a limitation as to the uses. The purposes for which they may be used are enumerated. The lessee does not bind himself to use for those purposes continually or at all. The right of re-entry is not given *pro* nonuser, but for using, contrary, etc. As in the *Doe-Stevens Case* [3 B. & Ad. 299], the covenant was to repair—the right of re-entry was given for doing or causing to be done anything contrary to and in breach of the covenants. There was no forfeiture because nothing was done. So not using for any purpose is not using contrary to conditions of the lease.

"I have sought with the limited means at my disposal for judicial constructions of such language as is contained in the lease in question. I have found no case where it was construed as a condition or covenant that the lessee would continue to use the premises for the purposes specified. In the one case that I have found it was claimed that the terms of the lease had been violated by not continuing to use for the purposes named and using for another purpose. The language was, 'is made upon and subject to the express condition that for twenty years shall use that portion of the granted

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land . . . exclusively for hotel accommodations, and for no other purpose whatever.' There was a further provision that terms not affected by destruction of buildings by fire. Buildings were destroyed, not rebuilt, and premises leased for other purposes. Held, forfeiture and right to re-enter. In case referred to in 6 Wis. 12 [*Hooper v. Broderick*, 11 Sim. 46], there was express covenant to use and keep open as an inn. It proved a losing business, and equity refused to enjoin from discontinuing. It was not deemed that there was a covenant to do so, on which lessor might have maintained an action.

"In most of the reported cases the lease contained an express agreement not to use for other purposes. Some cases have held that a specification of the purposes for which to use amounted to a covenant not to use for other purposes. A different rule was early stated by our supreme court. *Brugman v. Noyes*, 6 Wis. 1. The language of the lease was, 'to be used as cabinet warerooms.' An injunction was sought to restrain lessee from using for sale of cigars and other things. The court says:

" 'The insuperable difficulty in this case is that there is no express covenant not to use the building except for cabinet warerooms.' . . . 'Counsel for the complainant contends that the clause in the lease that the premises were to be used as cabinet warerooms amounts to a direct covenant to use them as such, and for no other purpose whatever. We are unable to concur in this construction of the lease.' . . . 'And if he can compel the defendants to change their trade from selling cigars and safes to selling cabinet ware, it appears to us he could compel them to use them as cabinet warerooms, even if they should desire to remove from the buildings and shut them up. We apprehend that a court of equity would pause before exercising such a jurisdiction as to compel the defendants to occupy the premises as cabinet warerooms when they desired to close them.'

"There is no intimation that equity would not do so if there was an express covenant to keep open and use—there clearly

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would be no adequate remedy at law. Were the question whether the provisions did not amount to a covenant, and conditions not to use for any other purposes than those specified, it might well be held that there is a covenant to continue without interruption the use for the purposes specified.

"'If rent has been paid to apply upon any portion of the term which the lessee is prevented from enjoying, that may be recovered with legal interest. If no sum has been so paid, the damages are deemed to be nominal only.' *Gross v. Heckert,* 120 Wis. 314, 322, 97 N. W. 952. The damages to that extent would be the same in this form of action, if the rent paid was equal to the rental value. If more, only the value could be recovered for; if less, full value could be recovered. The evidence shows that rental value was same as that paid. If the use of the premises were of same value during the whole year, one month the same as another, the value of the remaining ten months would be ten twelfths of the $500. But such is not the case. The premises have no rental value for the purposes named or any rental value except during the summer season. This is considered from May 15th till September 15th, but business is done from May 1st to October 1st, a period of five months. The first half of May probably equal in value to the last half of September. This makes all the value in those five months, or $100 per month. (Nugent says in fixing the rent he would apportion it over those months.) The plaintiff enjoyed two months of the term. The balance of the term paid for was worth $300 unless for some reason it is shown to be worth less. Had the town 'gone dry' and no license been granted, it would have lost all of its value for saloon purposes, and the recovery would have been limited to its value for other uses. The plaintiff, by failing to obtain a license July 1st, lost the right to use the premises for saloon purposes until a license would thereafter be procured after fifteen days' public notice of the application. No steps were taken. Had they acted at once after that, they would have rendered the prop-

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erty not a lawful place for a saloon for about eighteen days, which would be three fifths of a month, or $60. But during that time it was worth $24 a month for other purposes, or about $14.75. This would make the rental value of the unexpired portion of the term about $255.

"I have considered the other positions taken by defendant's counsel in his brief, but conclude upon the whole evidence the plaintiff is entitled to a verdict for $255 with interest from July 1, 1911, amounting to $276.65.

"Motions for directed verdicts were made at the close of the trial November 30, 1912. The jury were discharged with the understanding that after hearing arguments from counsel the court would decide the motions and order such verdict entered as it thought to be the proper one. I think the verdict should be entered *nunc pro tunc* as of that date. And the order will be that verdict be entered for the plaintiff for $276.65 as of the date November 30, 1912."

We approve and adopt the foregoing as the opinion of this court.

By the Court.—The judgment of the court below is affirmed.

LIEBMAN, Appellant, vs. WELSH, Respondent.

January 13—February 9, 1915.

Negligence: Collision between motorcycle and vehicle.

In an action for injuries sustained in a collision between plaintiff's motorcycle and defendant's vehicle, a finding of the circuit court acquitting defendant of negligence is *held* not to be against the preponderance of the evidence.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

Plaintiff brought this action to recover damages from the defendant for personal injuries and damage to his clothing

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and motorcycle, alleged to have been sustained as a result of a collision with a vehicle driven by the defendant. The complaint alleged that on October 17, 1912, plaintiff was riding a motorcycle in an easterly direction on Main street in the city of Green Bay; that the defendant was driving a horse and carriage in the same direction, a short distance in front of the plaintiff; that as defendant approached the corner of Monroe avenue and Main street he turned his horse suddenly to the left to go north on Monroe avenue; that plaintiff was about to pass to the left of the defendant, and that owing to the sudden turn to the north his motorcycle collided with the carriage, throwing him to the pavement; that the collision was the result of the defendant's negligence in turning the corner before reaching the easterly side of Monroe avenue, in violation of an ordinance of the city of Green Bay providing that a vehicle turning to the left into another street shall pass to the right of the road and beyond the center of the street intersection before turning. By his answer the defendant denied the allegations of the complaint charging him with responsibility for the accident, and alleged negligence on the part of the plaintiff, in that he was running his motorcycle at an excessive and dangerous rate of speed, in violation of the city ordinance. The action was commenced in justice's court, where plaintiff recovered damages to the amount of $17.50. An appeal was taken to the circuit court, where, by agreement of the parties, the case was tried *de novo* on the record from the justice's court. The circuit court found that the evidence failed to show negligence on the part of the defendant and ordered judgment dismissing the complaint. Plaintiff appeals from a judgment entered in accordance with such direction.

A. McComb, for the appellant.

For the respondent there was a brief by *Greene, Fairchild, North, Parker & McGillan,* and oral argument by *John W. Gauerke.*

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BARNES, J. The finding of the circuit court acquitting the defendant of negligence is not against the preponderance (much less the clear preponderance) of the evidence, and the judgment must therefore be affirmed.

By the Court.—Judgment affirmed.

DE GRAND, Respondent, vs. BARKHAUSEN COAL & DOCK COMPANY, Appellant.

January 13—February 9, 1915.

Master and servant: Injury while loading cars: Negligence: Moving loading rig without warning: Failure to make rules: Contributory negligence.

1. A rig called a whirly, used at defendant's coal dock in unloading vessels and loading cars, consisted of a swinging crane mounted on a steel framework which ran on two rails about fourteen feet apart, being moved thereon by the engine which operated the crane. Gondola cars could pass under it on a track laid between the rails of its track. The engine was located in an inclosed house on the whirly about twenty-two feet above the ground, and the engineer could not see the track in front of the rig for a distance of thirty or forty feet. While a car was being loaded and plaintiff, in the performance of his duty of blocking the car, was sitting on one rail of the whirly track opposite the car wheel and intent upon preventing the car from slipping, the whirly was started without warning and he was caught by it and injured. The whirly made a loud, grinding noise when in motion, and no warning was customary when starting it, although the engine had a whistle. It was not customary for it to move on its track while loading a car. A number of separate crews were working about the dock, and the engineer knew that at least three men were near the whirly and the car which was being loaded. Evidence showing the above and other facts is *held* to sustain findings by the jury to the effect that defendant was negligent in failing to promulgate rules requiring the giving of a signal before moving the whirly; that the engineer was negligent in not sounding a warning; and that plaintiff was not guilty of contributory negligence.

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APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed.*

Action for personal injury. Defendant operated a coal dock in Green Bay. May 1, 1913, plaintiff, then about twenty-seven years of age, was in its employ assisting in loading cars by means of a rig called a whirly. The rig was constructed and operated as follows: It consisted of a swinging crane mounted on a steel framework about sixteen feet high in the clear, and ran on two rails about fourteen feet apart. It would pass under the bridge of the dock and would also permit a gondola car to pass under it on another track located midway between the rails of the whirly track. The whirly rail nearest the edge of the dock was five feet from the bridge rail, which was located near the edge of the dock, and five feet four inches from the nearest rail of the car track. The crane arm was fifty-one feet long, and had a clam-shell bucket attached at the end which could not be moved in and out on the arm. The whirly was moved along the track by the engine that operated the crane. It was located in an inclosed house on the whirly about twenty-two feet above the ground. Owing to the projection of the platform on which the engine house stood, the engineer could not see the track directly in front of the whirly for a distance of some thirty or forty feet.

In operating the whirly the crane was swung over the boat and the bucket lowered into the hold and filled with coal and then swung over the gondola car and emptied. As the bucket could not be moved in and out on the crane arm it was necessary to shift the cars while being loaded. The crew consisted of an engineer and fireman in the crane house upon the rig and three men upon the ground. One of the men moved the car by means of a pinch bar, another worked the hand brake on the car, and the third, the plaintiff, blocked the wheels of the car in order to stop it, as the track was on a slight down grade and the hand brake would not work quickly enough.

At the time of the injury to the plaintiff he was blocking

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a car that had been pushed down to within about twenty feet from the whirly. The car was forty feet long and the coal was being dropped into about the center of it. The angle at which the fifty-one foot crane arm was set reduced its horizontal reach to about forty feet. Plaintiff sat on the whirly track, probably about eighteen or twenty feet from the whirly, though he claims only from four to eight feet away, watching his work, with a block ready in case it should need reblocking, when the engineer of the whirly, without any warning or signal, started it along the dock for water. No warning was customary when starting it. Plaintiff did not hear or see the approach of the whirly and was caught by it and badly pinched about the thigh.

The jury found (1) that defendant was negligent in failing to promulgate rules requiring the giving of a signal before moving the whirly; (2) that such negligence was the proximate cause of plaintiff's injury; (3) that the failure of the engineer on the whirly to sound a warning was a proximate cause of plaintiff's injury; (4) that no want of ordinary care on the part of the plaintiff contributed to his injury; and (5) damages $1,400. From a judgment upon the verdict in favor of plaintiff defendant appealed.

For the appellant there was a brief signed by *Martin, Martin & Martin* and *G. F. Clifford,* and oral argument by *Mr. Clifford.*

For the respondent there was a brief by *Minahan & Minahan,* and oral argument by *V. I. Minahan.*

VINJE, J. The refusal of the court to direct a verdict for defendant on the ground that the evidence failed to show any negligence on its part, and on the further ground that it showed contributory negligence as a matter of law, is assigned as error. It is established by the evidence that the whirly had a couple of large gear wheels that moved and made a loud grinding noise different from any other noise

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when it was moving from place to place; that it started very slowly and never reached a speed of more than four miles an hour. For these reasons it is urged there was no necessity for promulgating rules for signals before starting, nor for giving any, since the noise made by the whirly when moving was a sufficient signal. The jury negatived both contentions by finding that defendant was negligent in failing to promulgate rules requiring the giving of a signal before moving the whirly, and inferentially found the engineer guilty of negligence by finding that his failure to give a signal was a proximate cause of plaintiff's injury. The situation and the evidence is such as to warrant both findings. A number of separate crews were working in and about the coal dock in addition to the crew directly engaged in loading the cars. That the whirly when in motion was not only able but likely to inflict severe injuries upon any one inadvertently caught by it or in its path, is self-evident. The engine was supplied with a whistle, affording an efficient means of giving a signal *before* starting. Plaintiff's crew, or part of it at least, including plaintiff, were, in the operation of loading cars, required to work in close proximity to the whirly. The jury might well come to the conclusion that under such circumstances a signal *after* starting and while in motion would not be adequate protection to those who worked about it, though such a signal might meet the requirements as to loudness and as to what it indicated. It is true the plaintiff must have been about twenty feet from the whirly when it started to move, but it is also a verity in the case that he neither saw nor heard it before it was upon him. He so testifies and such must be the fact, for no one can assume that he voluntarily subjected himself to imminent serious injury or death. The situation disclosed was therefore one in which the jury might well say that rules requiring a signal to be given *before* starting the whirly should have been promulgated by the defendant.

When the engineer started up the whirly to go to the other

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end of the dock for water the crew had about half loaded a car. The evidence shows that it was not customary for the whirly to move on its own track while loading a car. Owing to the projection of the platform the engineer could not see the ground in the direction he moved the whirly for a distance of some thirty or forty feet. He knew that at least three men belonging to the crew were near the car and near the whirly. He also had reason to believe that they had no cause for anticipating that the whirly would be moved before the loading of the car was completed and yet he started it without blowing his whistle, as he might easily have done. Such conduct sustains a finding of negligence. And since the employer had four or more men in a common employment and the injury happened after the enactment of the law of 1911 (sub. 1, (2), sec. 2394—1, Stats.) the defendant was responsible for the negligence of the engineer.

If it had been the custom to move the whirly on its own track often and at irregular intervals without regard to the work that was being done with it, and the plaintiff had known such a custom, a strong case of contributory negligence would have been presented—perhaps so strong as not to sustain a finding to the contrary. But here we have a case where plaintiff had no reason to believe that the whirly would be moved at least until the car being loaded was finished. One car that morning had been insecurely blocked and had slipped. Plaintiff was intent upon watching this car so that it would not slip and cause trouble. He had a block ready, and as it was convenient for him he sat down on the whirly track just opposite the car wheel, which he says was a good position for him to watch the car. Concede that he might have placed himself in a safe place somewhere else. The position he took cannot as a matter of law be said to be a negligent one in view of the fact that he had no reason to suppose the whirly would be moved until the car was loaded, if then.

By the Court.—Judgment affirmed.

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ANDREWS, Respondent, vs. UNITED STATES CASUALTY COMPANY, Appellant.

January 14—February 9, 1915.

Accident insurance: Cause of death: Suicide: Evidence: Competency: Credibility of witness: Arguments to jury: Harmless error: New trial: Newly discovered evidence.

1. In an action upon an accident policy, the main question being whether the assured, who died from a bullet wound, intentionally shot himself (thus avoiding the policy) or was shot by his mistress, and she having been charged with murder, so that it was to her interest as well as that of the insurance company that she should testify that the assured shot himself and should also testify to any and all facts which would point that way, evidence that there had been consultations between her or her attorney and the insurance company's claim agent prior to her testifying in the action on the policy, was competent on behalf of plaintiff as bearing on the credibility of the woman's testimony.
2. Remarks of plaintiff's counsel in his argument to the jury, in which he commented upon the supposed intimate relations between defendant's claim agent and the woman's attorney in the criminal action, while containing personal abuse which cannot be approved, are *held* not to have been prejudicial.
3. A motion for a new trial on the ground of newly discovered evidence that the assured had a rupture, contrary to a warranty in his application for the policy—such fact to be proved by the testimony of his mistress,—is *held* to have been properly denied, both because defendant had not used diligence to discover such evidence or defense and because, two juries having rejected the testimony of the woman as unworthy of belief, there was little likelihood that her testimony would make any change in the result on another trial.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

Action upon a policy of accident insurance upon the life of one William T. Ebeling, who died from the effects of a bullet wound. There were two grounds of defense urged, viz.: that the assured intentionally shot himself, and that he

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was of "intemperate habit," contrary to a representation made by the assured in the application on which the policy was based. The action was here upon appeal from a previous judgment in plaintiff's favor and was reversed and sent back for a new trial on account of detail errors. 154 Wis. 82, 142 N. W. 487.

Upon the present trial the jury returned a special verdict to the effect (1) that the injury which caused the death was inflicted by Cora Edwards, and (2) that Ebeling at the time of making the application was free from intemperate habits.

A motion for new trial was made for errors committed on the trial and on account of newly discovered evidence, but the motion was denied and judgment rendered for the plaintiff for the amount of the policy and costs, from which the defendant appeals.

For the appellant there was a brief by *Jeffris, Mouat, Oestreich & Avery,* and oral argument by *O. A. Oestreich.*

For the respondent there was a brief by *Martin, Martin & Martin,* and oral argument by *P. H. Martin.*

WINSLOW, C. J. No claim is made that the evidence is insufficient to sustain the verdict. The substantial errors claimed are but two in number, and will be briefly considered.

1. The great question in the case was whether Ebeling shot himself or whether his mistress, Cora Edwards, shot him, it appearing that the fatal shot was fired when the two were in a room together with no one else present. The deposition of Cora Edwards was taken and offered in evidence by the defendant and was to the effect that he shot himself. On the other side there was considerable evidence of statements made by both Ebeling and the woman immediately after the shooting, and which were admitted as part of the *res gestæ,* to the effect that she shot him. A criminal prosecution was immediately begun against the woman for murder and the prelim-

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inary examination had. The plaintiff called the defendant's claim agent, one Whalen, as an adverse witness and attempted to show by him that he was frequently in consultation with the woman's attorney in the criminal case during the early days of the criminal prosecution. The questions were objected to, but the objections were overruled. The witness denied all such interviews except one which took place two or three weeks after the preliminary examination. It was, of course, to the interest of the defendant in the civil action that the woman should testify not only that Ebeling shot himself, but also that she should testify to any and all facts which would point in that direction. It was also to the interest of the woman that she should so testify in the criminal case. If there was in fact a getting together or consultation between the woman or her attorney and the defendant's claim agent prior to the giving of her testimony in the civil case, it seems that the fact might very well be considered in determining the credibility of her testimony in the civil case. Not perhaps that it would be of great weight, but that it would be one of the facts entirely proper to be known by the jury when considering the amount of credence which ought to be given to her testimony; in a word, a proper part of the setting of the picture. In this same connection objection was taken to a part of the argument of counsel for the plaintiff, in which he commented upon the supposed intimate relations between Whalen and the woman's attorney in the criminal case. The remarks contained personal abuse which cannot be approved. Nevertheless we do not feel that we can say that prejudice resulted therefrom.

2. On the day preceding the conclusion of the trial the plaintiff called Fred C. Ebeling, the brother of the deceased, in rebuttal of the testimony introduced by defendant tending to prove intemperate habits on the part of the deceased. Upon cross-examination the witness stated that he knew of his brother's going to West Baden, and further that "I knew he was

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going to try to get help for his rupture." The case proceeded without further reference to the matter until after the verdict came in, when the defendant moved for a new trial, in part upon newly discovered evidence, and produced in support thereof the affidavit of Cora Edwards in which she alleged that to her personal knowledge the deceased had a serious and painful rupture from 1906 down to 1910, and related the facts with great detail and particularity. The affidavit was met by counter affidavits of the chauffeur of the deceased, who also had the care of the flat which deceased occupied and was familiar with his personal effects and clothing, and by the affidavits of business associates, all to the effect that they never had seen any indications of any such difficulty; also by the affidavit of a physician who gave the deceased two physical examinations, one in June, 1907, and one in January, 1909, and who swore that there was no indication at either time of any rupture. At both of such examinations the deceased was stripped of his clothing.

The motion was overruled. Upon the question of the newly discovered evidence or defense the trial court very justly said in a written opinion:

"The defense is that the insured in his application for insurance represented and warranted that he was free from any 'physical disorder, defect, deformity, impairment, or infirmity,' and that he had a rupture or hernia in the left side of his abdomen. The insured was injured and died in September, 1910. Very shortly after his death defendant's agent was on hand at the examination of Cora Edwards, seeking for grounds of defense against liability of defendant on its policy. Said Cora Edwards had lived with the insured for some months as his wife and for some years as his mistress, the time covering that when the policy of insurance in question was obtained. When this action was commenced the defendant found in the said Cora Edwards a witness willing to testify in its behalf to any fact known to her which would constitute a defense in this action, and did so testify fully on

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all subjects concerning which she was interrogated. Defendant knew that her knowledge of and acquaintance with the insured was such that she must have known the facts if he had any physical disorder, defect, deformity, impairment, or infirmity.

"The case was at issue two terms before reached for trial, tried, and appealed to the supreme court, and tried a second time. The question presented by this application is, Did not due diligence on the part of the defendant require it to inquire of Cora Edwards as to the facts which it knew must be known to her and which if found would constitute a defense to the action?

"The assertion of a claim under the policy is an assertion that the policy is valid and binding on the defendant.

"Defendant knows just what warranties were made in application. Breach of them, or any, is an affirmative defense. It becomes the defendant's duty at once to use diligence to ascertain whether it has any defense because of breach of warranty.

"In *Scott v. Hobe,* 108 Wis. 239, 84 N. W. 181, a motion for a new trial was made on ground of newly discovered evidence. It appeared that the party knew that the proposed witness had occupied a position where he would be apt to know something about the facts. The court says: 'The affidavits further showed that neither the defendant nor his attorneys had ever interviewed Lind to see if he *knew any facts concerning the case* previous to the trial. We think common diligence and prudence in preparing for trial would have suggested that Lind be interviewed to ascertain what knowledge he had concerning the matter. He was in defendant's employ, was within easy access, and had seen plaintiff frequently during the employment, and it would seem quite probable that he might have had some material conversations with the plaintiff.' Cases are cited from other states to the proposition that diligence requires a party to inquire of one who it may be reasonably presumed has knowledge as to the fact, and it seems to me that the facts of this case bring it clearly within the rule."

To this the court might have added that two juries had rejected the testimony of the woman as utterly unworthy of

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belief and that there would be small prospect of her testimony making any change in the result on a third trial.

We find no other contention which seems to require detailed treatment. We have examined all the questions raised by the appellant and find no reason for reversing the judgment.

By the Court.—Judgment affirmed.

BOLAND, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

January 14—February 9, 1915.

Carriers: Injury to horses: Exposure: Negligence in spotting car: Cause of injury: Evidence: Sufficiency.

1. In an action for injury to horses alleged to have been caused by defendant's negligent delay in spotting the car in which they had been carried so that they could be unloaded, it appearing that after the car arrived at its destination plaintiff's employees in charge thereof, knowing that the horses were sweating and that the car could not be spotted for several hours, went away leaving the side doors of the car partly open, and that when they returned the horses were cold and shivering, it is *held* that, even assuming that defendant was negligent in delaying to spot the car, the jury was not warranted in finding that such negligence was the proximate cause of the injury.
2. The evidence in such case is *held* insufficient, also, to warrant a finding that the death of one horse and the foundered condition of another was caused by exposure in the car.

APPEAL from a judgment of the circuit court for Ashland county: G. N. RISJORD, Circuit Judge. *Reversed.*

This is an action to recover damages for the death of one horse and injury to another, alleged to be due to the negligence of the defendant in preventing the unloading of a shipment of horses by plaintiff within a reasonable time after their arrival at their destination.

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The plaintiff shipped a carload of eight horses from Rhinelander to Antigo over the defendant's road. The plaintiff sent two men with the car to look after the horses. The horses were shipped in a train which was to leave Rhinelander about 7:30 o'clock p. m. and was to arrive at Antigo about 11:15 p. m.

In making this shipment the small square door in the rear or north end of the car was left open and the side doors were also cleated open a foot or a foot and a half. When the train arrived at Monico Junction, fourteen miles from Antigo, Leith, one of the men in charge, examined the horses and they were found to be pretty well heated up, that is, sweating. Leith and his companion place the time of arrival at Antigo between 11 and 12 o'clock. The exact time of arrival was shown to be at 11:15 p. m. The train inspectors took charge of the train of cars and placed a blue light on the front end of the train to indicate the train was undergoing inspection for safety devices under the federal law. According to regulations and rules the train cannot be broken up until such inspection is completed. It took from forty to forty-five minutes to inspect the train. Leith testified that the horses were heated and sweating when they arrived at Antigo. Soon after the arrival he spoke to a person, whom he believed to be the yardmaster, and requested that the car be spotted as soon as possible, and was informed that it could not be spotted until a passenger train had pulled through, which was due at 2:35 a. m. This train did not arrive until 3:09 a. m. Leith and his helper went down town and had lunch, and upon returning they found the horses were cold and shivering and shaking. They then shut the side doors and Leith remained in the car with them. The car was spotted at 3:30 a. m. The horses were unloaded between 5 and 6 o'clock that morning. The weather conditions of the night were shown to be cooler after midnight, but the thermometer did not fall to the point of freezing. It appears that after the horses were unloaded

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and put in a barn one horse, called "Doc," was noticed to be unwell. Dr. Ross, who examined the horse, testified that he was called in to look at this horse about 11:15 that morning; that he found him in a condition of colic; that colic often results from excitement and immediate feeding, and that the symptoms this horse showed might develop into pneumonia. Another horse, called "Bob," alleged to have been foundered, was not seen by Dr. Ross. He testified, however, that if a horse had been sweating and then suddenly cooled off and shivered, it very probably would develop into a case of founder almost immediately.

The jury found in substance that the death of the horse "Doc" was caused by exposure after the arrival of the car in Antigo and before unloading, and that the stiffened condition of the horse "Bob" was caused by like exposure; that the employees of the plaintiff did request the switch foreman, fifteen minutes after arrival, to spot the car; that the car was not spotted within a reasonable time; that this failure was the proximate cause of the death of the horse "Doc" and the foundered condition of the horse "Bob;" that plaintiff's servants were not guilty of any want of ordinary care that proximately contributed to the death and foundered condition of these horses; that there was no stock contract entered into; and assessed the value of the dead horse and the damage by founder to the other. The court awarded judgment for the recovery of these sums in plaintiff's favor. From such judgment this appeal is taken.

Edward M. Smart, for the appellant.

For the respondent there was a brief by *McCloud & Pierrelee,* and oral argument by *Victor T. Pierrelee.*

SIEBECKER, J. The defendant assigns error upon the action of the trial court holding that the evidence sustains the finding of defendant's negligence, as alleged, by the jury, and that the evidence permitted an inference that if defendant

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was negligent as charged such negligence was the proximate cause of the alleged damage to the plaintiff's horses. We are of the opinion that the court erred in holding that there is evidence in the case tending to show that the alleged negligence of defendant's servants in unreasonably delaying spotting of the car with plaintiff's horses, after its arrival at Antigo at 11:15 o'clock p. m. on the day in question, was the proximate cause of the injury and damage to plaintiff's horses. It appears that when the train reached Antigo at 11:15 o'clock in the night the men in charge of the horses requested the foreman of the switch engine to have the car spotted immediately; that he informed them that the car could not be spotted until after the next passenger train had passed, which would be sometime between 1 and 2 o'clock; that these men then made further effort to have the car spotted immediately, but did not succeed; that they left the yards to get a lunch, and on returning about one hour and a half after the train had arrived they again made request at the ticket office to have the car spotted and were directed to see another in charge of this operation; that their further effort in this regard failed; that they went to the car and found that the horses had become cold and were shivering and then closed the side doors of the car, which had been open on both sides about from a foot to a foot and a half. One of them remained in the car with the horses until morning, when they were unloaded between 5 and 6 o'clock. The car was spotted about half past 3 o'clock, the passenger train passing at nine minutes after 3 o'clock. Assuming as a verity the finding of the jury that defendant's servants negligently delayed the spotting of the car, the inquiry is, Does the evidence show with reasonable distinctness that such delay in spotting the car proximately caused the injury to plaintiff's horses? The evidence shows that the defendant performed its duty in having all trains from the north stop for inspection required under the federal law. Any train, while under inspection, is not to be broken up. It re-

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quired from forty to forty-five minutes to inspect this train. The caretakers of the plaintiff's horses testify that they left the side doors of the car open when they left it to get a lunch and that the horses were cold and shivering when they returned after lunch, when they closed the doors. Common knowledge suggests and the opinion evidence in the record accords with the fact that if plaintiff's horses suffered from exposure on this trip it probably occurred within the time from the arrival at Antigo and the time the caretakers returned to the car after lunch while the car stood in the yards with the side doors open. The caretakers had been told that the car would not be spotted until the next passenger had passed, sometime between 1 and 2 o'clock. The fact that defendant's servants unjustifiably delayed spotting the car did not relieve the caretakers from performing their duties with reasonable care, and required of them, under the circumstances and notice of such delay before the car would be spotted, to protect the horses from exposure from a change in temperature, so far as within their power. Admittedly they omitted closing the side doors, which obviously was the main cause in exposing the horses to the changed conditions of temperature and produced the cold and shivering condition of the horses which the caretakers noticed when they returned from lunch. It would be mere speculation and conjecture to attempt to differentiate in what degrees the delay of spotting the car and the conduct of the caretakers in exposing the horses to the coldness of the night by leaving the doors of the car open contributed to produce injuries to plaintiff's horses of the nature here complained of. Under the state of the evidence the plaintiff has not established with reasonable distinctness that defendant's negligence was the proximate cause of the injuries complained of. The evidence leaves an answer to this question in the realms of conjecture and the jury's findings upon the subject are not supported by facts warranting such inference with any reasonable certainty.

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The evidence is also insufficient to sustain this finding of the jury on another phase of the case, namely, that the death of one horse and the foundered condition of the other were caused by exposure after their arrival in Antigo before they were unloaded from the car. The caretakers' bare assertion that the horses took cold in the car is wholly unsupported by the facts and circumstances or expert knowledge on their part to show that they knew this fact. So far as the record shows it was a mere guess on their part. The evidence of other witnesses concerning the probable cause of the sick condition of these horses on the day after their arrival at Antigo leaves the matter in such doubt that no person can tell with any reasonable probability that their condition was caused by exposure in the car. The record is devoid of any evidentiary facts, or of opinions of the experts based on the facts in evidence, showing that exposure of the horses caused their sickness, and hence there is no evidence which reasonably permitted the jury to find that exposure on the trip caused the horses to become sick. The record shows that the ailments of these horses may have been due to causes wholly unconnected with defendant's action in delaying spotting of this car. Under such a state of the case it is mere speculation to attribute their condition to the defendant's negligence. The court erred in submitting these issues to the jury. The defendant was entitled to judgment dismissing plaintiff's complaint.

By the Court.—The judgment appealed from is reversed, and the cause remanded with direction to enter judgment dismissing plaintiff's complaint.

BARNES, J., took no part.

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STASZCZUK, Appellant, vs. GILMAN MANUFACTURING COMPANY, Respondent.

January 14—February 9, 1915.

Limitation of actions: Notice of personal injury: Sufficiency: Release of damages: Waiver of notice: Estoppel.

1. **An instrument executed by a minor, in the nature of a release of damages for a personal injury, which not only failed to show that claim for damages would be made but imported on its face that no claim would be made, cannot be deemed such a notice of the injury as is provided for in sub. 5, sec. 4222, Stats.**
2. **Payment of money by an employer to an injured employee, whereupon the latter executed a release of all claims for damages on account of the injury, did not operate as a waiver of notice of the injury or estop the employer from asserting that no notice had been served, in a subsequent action by the employee to recover damages for such injury.**

APPEAL from a judgment of the circuit court for Taylor county: G. N. RISJORD, Circuit Judge. *Affirmed.*

This action was brought to recover for personal injuries sustained by the plaintiff while in the employ of the defendant. At the time of injury the plaintiff was about eighteen years and five months old and was in the employ of the defendant operating a car, which was run by hand, down an incline from the mill of the defendant into the mill yard, which car was used for hauling headings out of said mill. At the time of the injury plaintiff was holding a stick upon the wheel of said car and pressing down upon it for the purpose of braking and controlling the speed of the car running down the incline, and the stick slipped from the wheel, in consequence of which plaintiff fell from the track and was injured. The injury occurred on the 22d day of March, 1910.

The action was based upon the negligence of the defendant. The defendant denies the material allegations respecting negligence and sets up negligence and assumption of risk on the part of the plaintiff. Some other defenses are set up by de-

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fendant, and among others that no notice of the injuries was served by plaintiff as required by sec. 4222, Stats.

At the close of the plaintiff's evidence the court granted a nonsuit. Judgment was rendered for the defendant, from which this appeal was taken.

For the appellant there was a brief by *Fogarty & Gonska* and *Victor Linley,* and oral argument by *Mr. Linley.*

For the respondent there was a brief by *McGill & Williams,* and oral argument by *Glen H. Williams.*

KERWIN, J. It is undisputed that no notice of injury was served, unless an instrument in the nature of a release of damages operated as a sufficient notice. The following is the so-called release:

"In consideration of the payment of fifty and no/100 dollars to me in hand paid by *Gilman Manufacturing Company,* I do hereby release and forever discharge said *Gilman Manufacturing Company* from any and all actions, causes of actions, claims and demands for, upon or by reason of any damage, loss or injury, which heretofore have been or which hereafter may be sustained by me in consequence of an accident which happened to me on or about the 22d day of March, 1910, wherein I sustained injuries to both my right and left foot and various other external and internal injuries while in the employ of the said *Gilman Manufacturing Co.* It is also understood and agreed that I am twenty-one years of age.

"It being further agreed and understood, that the payment of said fifty and no/100 dollars is not to be construed as an admission on the part of said *Gilman Manufacturing Company* of any liability whatever in consequence of said accident.

"In witness whereof I have hereunto set my hand and seal this 12th day of May, 1910.

"Signed and sealed in the presence of JOSEPH STASCZECK. (Seal.)

"Anson Heagle.

"Tony Heagle."

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It is insisted by counsel for appellant that the foregoing contains all the elements which the statute requires, therefore was a sufficient notice. Sub. 5 of sec. 4222, Stats., provides:

". . . No action to recover damages for an injury to the person shall be maintained unless, within two years after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corporation by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made and that satisfaction thereof is claimed of such person or corporation. Such notice shall be given in the manner required for the service of summons in courts of record. No such notice shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein in stating the description of the injuries, the manner in which they were received or the grounds on which the claim is made, provided it shall appear that there was no intention on the part of the person giving the notice to mislead the other party and that such party was not in fact misled thereby; provided, that the provision herein requiring notice of two years shall not apply to any event causing damage which happened before the passage and publication of this act. When an action shall be brought and a complaint actually served within two years after the happening of the event causing such damages, the notice herein provided for need not be served."

This section contains no exception in favor of minors. *Hoffmann v. Milwaukee E. R. & L. Co.* 127 Wis. 76, 106 N. W. 808. The release above set forth does not comply with the statute even if treated as a notice served, which it was not intended to be. It fails to state one at least of the essential requirements of the statute, namely, that the plaintiff claims satisfaction of the defendant for the injuries. It not only fails to state this material element of the notice required by the statute, but the clear implication of the release is to the

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effect that no claim would be made for damages. The release may be said to be some evidence of the fact that plaintiff made a claim before the release was signed, but it is also evidence of his intention that none would be made after the execution of the release. There is nothing whatever in the instrument of release showing that plaintiff continues to make claim against the defendant, but on the contrary any claim he had or claimed to have is released. The object of the notice is to inform defendant that a claim for damages is made and thus enable the defendant to make investigation seasonably. If an instrument which not only fails to state that claim for damages will be made but imports on its face that no claim will be made be held to comply with the statute, the purpose of the statute is defeated. *Malloy v. C. & N. W. R. Co.* 109 Wis. 29, 85 N. W. 130; *Maurer v. Northwestern I. Co.* 151 Wis. 172, 138 N. W. 636.

Counsel for appellant relies upon *Odegard v. North Wis. L. Co.* 130 Wis. 659, 110 N. W. 809, and *Wawrzyniakowski v. Hoffman & B. M. Co.* 146 Wis. 153, 131 N. W. 429. These cases do not reach the question here. They are cases where suit was commenced and complaint served before expiration of two years from the time of injury, and the statute expressly provides that in such case no notice other than the complaint is necessary. Sub. 5, sec. 4222, Stats.

Some contention is made to the effect that the defendant waived notice or is estopped from asserting that none was served. We find no warrant for such contention in the record. On this question of waiver and estoppel counsel relies upon *Guile v. La Crosse G. & E. Co.* 145 Wis. 157, 130 N. W. 234. The principal question in that case was whether the defendant could estop itself from invoking the bar of the statute as to giving notice under sub. 5, sec. 4222, and it was held that it could, and there was evidence that the officers of defendant told the daughter of plaintiff that it was not neces-

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sary to serve any papers, and other evidence tending to show that defendant should be estopped. There is no evidence in the present case that any act of the defendant induced the failure of service of notice and no evidence of waiver.

In our view of the case it becomes unnecessary to consider other questions discussed.

By the Court.—The judgment is affirmed.

CARLSON, Administratrix, Appellant, vs. CITY OF WASHBURN, Respondent.

January 14—February 9, 1915.

Municipal corporations: Sidewalk over ravine: Sufficiency of railing: Death of person: Proximate cause: Liability.

1. **In an action for death of a person who fell from a sidewalk where it crossed a ravine and who had stated, after the accident, that he was going to sit down and he fell over and that was the last he knew, the evidence is *held* insufficient to show that alleged defects in the railing along the walk were the proximate cause of the injury.**
2. **If the railing along a sidewalk where it crossed a ravine was reasonably safe and sufficient to protect persons traveling on the walk, the city is not liable for an injury to a person who fell into the ravine when he attempted to sit upon the railing.**

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

This action was brought to recover damages on account of alleged defects in a highway, which it was claimed caused the death of one Fred Carlson. His widow sues as administratrix. Two causes of action are set out in the complaint; the first to recover damages for pain, suffering, and medical expense incurred by the husband, and the second to recover damages under sec. 4255, Stats.

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Between Fifth and Sixth avenues in the city of Washburn, Bayfield street crosses a ravine over which there is a bridge. The railing on the sidewalk of the bridge is twenty-seven and one-half inches high. The top rail was 2 x 4, and the posts seven feet nine inches apart. Halfway between the sidewalk and the top rail there was a 1 x 6 board. At a point on the sidewalk over the ravine the top rail was split several months before the accident. The split in the rail was about eighteen inches long and had been fixed by nailing or spiking the parts together. The bottom of the ravine was about twelve feet from the sidewalk at this point, and in it there were lying two logs extending at right angles with the bridge or trestle. The deceased was found lying between these logs, almost directly below where the railing had been broken. He was lying on his back, his feet away from the sidewalk and his head towards it. He was conscious, but could not move. His legs were completely paralyzed and his arms partly so. The injury was to the upper part of the dorsal spine. No bruises were found. He lived about five weeks. The deceased was thirty-nine years of age, over six feet tall, and weighed more than 200 pounds, and apparently had been in good health. He was last seen before the accident at half-past 8 o'clock in the evening. He was found about half-past 1 the following morning by a city policeman. The city lights were extinguished at 12 o'clock. No one apparently knew where Carlson was or what he did from 8:30 in the evening until he was injured. It was very dark after the street lights went out. A policeman in passing over the bridge heard some noise in the ravine, and, on going down to investigate, found Carlson. He asked Carlson how he got down there, and Carlson replied that he "was going home and it was an awfully warm night and he was going to sit down and he fell over and that was the last he knew of it." This was the only statement made by Carlson as to how he was injured. The railing where the split had been nailed or spiked together was found to be substan-

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tially intact, although there was some evidence indicating that there was a little sag in it.

The court refused to admit any testimony in reference to the first cause of action, for the reason that the notice required by sec. 1339, Stats., had not been served. On the second cause of action the jury returned the following verdict:

"(1) Did the deceased, Fred Carlson, fall from the sidewalk or bridge in question and receive injuries from which he died? *A.* Yes.

"(2) Was the walk at the time and place of the alleged injury to the deceased insufficient for public travel?

"(a) By reason of the railing being too low? *A.* Yes.

"(b) By reason of defect in the top rail? *A.* Yes.

"(3) If your answer to either 'a' or 'b,' or both, in the foregoing question is 'Yes,' then was such insufficiency the proximate cause of the death of Fred Carlson? *A.* Yes.

"(4) Was the deceased guilty of any want of ordinary care which contributed proximately to produce his injuries? *A.* No.

"(5) At what sum do you assess plaintiff's damages? *A.* Five thousand dollars."

On motion of the defendant the court changed the answer to question 3 of the special verdict, holding that there was no evidence in the case which would warrant the jury in finding that the insecurity of the railing was the proximate cause of the injury to said Carlson. Judgment on the verdict as corrected was rendered in favor of the defendant, and plaintiff brings this appeal.

For the appellant there was a brief by *McCloud & Pierrelee,* and oral argument by *Victor T. Pierrelee.*

E. C. Alvord, for the respondent.

BARNES, J. The only evidence we have as to how the deceased was injured is his own statement that he was going to sit down and he fell over and that was the last he knew. If

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this statement be accepted as the fact, it is difficult to see how the height or the condition of the railing could be said to be a proximate cause of the injury. The railing was found in practically the same condition after the accident that it was in before. But if the alleged defects in the railing were a proximate cause of such injury the city would not be liable, because it was only bound to make the railing reasonably safe and sufficient to protect those using the viaduct for the purpose of traveling over the same. *Kelley v. Fond du Lac,* 31 Wis. 179; *Goeltz v. Ashland,* 75 Wis. 642, 44 N. W. 770; *Hawes v. Fox Lake,* 33 Wis. 438; *Reed v. Madison,* 83 Wis. 171, 53 N. W. 547. Municipalities are not bound to build railings of any particular height to accommodate persons who desire to sit on them. Neither are they obliged to provide railings that may not sag a little when persons weighing over 200 pounds sit on them.

If the statement of the deceased be disregarded, the matter of causal connection between the injury and the defective railing rests entirely in the realm of speculation and conjecture. This connection might be shown by circumstantial evidence, but we are unable to find any facts or circumstances testified to from which an inference could be drawn that the result was due to the negligence complained of. The ruling of the circuit judge was correct.

By the Court.—Judgment affirmed.

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STATE EX REL. SHEA, Appellant, vs. EVENSON, Respondent.

January 14—February 9, 1915.

Officers: Removal of town treasurer: Order of removal as proof of facts: Defalcation: Sufficiency of evidence: Constitutional law: Eligibility to office: "Being a defaulter."

1. An order made by a circuit judge pursuant to sec. 976, Stats., removing a town officer for wilful and corrupt official misconduct, is proof in a later civil action of the fact of removal but is not evidence of the facts upon which the order was based.
2. In an action to try the title to the office of town chairman the fact that there had been a defalcation by defendant when he held the office of town treasurer is *held* to be established by the evidence.
3. In sec. 3, art. XIII, Const., providing that "no person being a defaulter . . . to this state or to any county or town therein . . . shall be eligible to any office of trust, profit or honor in this state," the words "being a defaulter" refer to persons presently in default and not to one who has made good his defalcation.

APPEAL from a judgment of the circuit court for Iron county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Quo warranto to try the title to the office of chairman of the board of supervisors of the town of Mercer, Iron county. At the election April 7, 1914, the relator received forty-eight votes, the defendant fifty-eight votes, and one Bovee eight votes for the office. The relator claimed, however, that the defendant was at that time a defaulter to the town, and hence ineligible to hold office under sec. 3 of art. XIII of the constitution, which declares that "No member of Congress, . . . and no person being a defaulter to the United States or to this state, or to any county or town therein, . . . shall be eligible to any office of trust, profit or honor in this state."

The complaint alleged that the defendant was treasurer of the town from April, 1911, until January 6, 1914, and while treasurer converted more than $600 of the town funds to his own use, and was still a defaulter to the town; that in a removal proceeding before Hon. G. N. RISJORD, circuit judge,

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it was found by him that the defendant had converted $600 of the town funds to his own use and thereby was guilty of wilful and corrupt official misconduct. It was further alleged that the defendant was removed from office by order of said judge on January 6, 1914.

The defendant, by answer, denied that he was a defaulter, and alleged that he accounted for and paid over to his successor in office all the moneys of the town on or about January 6, 1914.

Upon the trial and against the defendant's objections the plaintiff introduced the record of the removal proceedings and further showed that he filed an oath of office in due season. Thereupon he rested his case. It appeared from the record aforesaid that the order of removal, dated January 6, 1914, was based upon a number of findings of fact. Among these findings was one to the effect that between April 1, 1912, and July 5, 1912, the defendant, *Evenson,* "unlawfully converted to his own use $600 of the funds of said town and in so doing was guilty of wilful and corrupt official misconduct." By a number of other findings it was determined that at a number of times during the years 1912 and 1913, and while the defendant was town treasurer, the supervisors of the town pretended to allow claims against the town, amounting in all to more than $700, in favor of sundry persons named who in fact had no legal claims against the town, and that orders were issued for the payment of said claims, signed by the chairman and town clerk, which were paid by the defendant as treasurer out of town funds, and that in allowing said claims and issuing said orders and in paying the same said supervisors, clerk, and treasurer were guilty of wilful and corrupt official misconduct. Upon this proof the relator rested the case. The defendant was sworn in his own behalf and testified that tax commission auditors examined his books in July, 1913, and claimed that he was short $602 in his school-fund moneys; that he had no idea how he came to be short;

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that he made good the shortage after the hearing in the removal proceeding and paid over to his successor in office every cent which the books showed.

Upon rebuttal one of the tax commission auditors who examined the defendant's books testified that he made an examination of the defendant's official books and that he found a shortage of $602.74 in the school funds, which occurred between April 1, 1911, and June 29, 1912; further, that he spoke to defendant about the matter and the defendant said that he knew he was short. Upon this evidence the court directed a verdict in favor of defendant and adjudged the defendant to be rightfully in possession of the office, and from this judgment the relator appeals.

The cause was submitted for the appellant on the briefs of *J. & M. Van Hecke* and *A. L. Ruggles,* and for the respondent on a brief signed by *George C. Foster,* attorney, and *Wm. F. Shea,* of counsel.

Counsel for respondent argued, among other things, that he was not a defaulter at any time. In a case of this kind, the failure or refusal to account and pay over must be *wilful* and *corrupt.* 29 Cyc. 1385, par. e; *State ex rel. Broatch v. Moores,* 52 Neb. 770, 73 N. W. 299; 2 Words & Phrases, 1930, "Defaulter." If a defaulter at any time, he was not at the time of his election to the office of chairman, having purged himself of the default by reimbursing the town long prior to such election. *State ex rel. Broatch v. Moores,* 52 Neb. 770, 73 N. W. 299; *State v. Dunn,* 11 La. Ann. 549.

WINSLOW, C. J. The questions in this case may be briefly stated as follows: (1) Are the findings and order of removal evidence in this action of the facts found in the removal proceeding? (2) If not, was there other sufficient evidence of the defendant's defalcation? (3) The defendant having made good his shortage before the election, was he ineligible under sec. 3 of art. XIII of the constitution?

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1. The first question must be answered in the negative. The present is substantially a civil action between two citizens to determine the title to office. It is well established that a judgment in a criminal action is not proof of anything in a later civil action, except of the fact of conviction and the legal consequences flowing therefrom. It cannot be given in evidence to establish the truth of the facts on which it was rendered. 1 Greenl. Ev. § 537; 2 Black, Judgm. § 529. *A fortiori* must this be true of the order of removal in the present case, because it is an administrative order only and not a judgment. It is doubtless conclusive proof of the fact of the removal, but in another action between other parties it is not evidence of the facts on which the removal was based. 23 Cyc. 1220. There was therefore no proof of any defalcation in the case when the plaintiff rested.

2. The second question must be answered in the affirmative. The defendant's own testimony showed the fact of the $600 shortage in the school money and the evidence of the auditor made the matter certain. There was, however, no evidence showing any other default or misconduct. The alleged corrupt payment of illegal town orders was unproven.

3. Sec. 3 of art. XIII of the constitution says that "No member of Congress, . . . no person convicted of any infamous crime in any court within the United States, and no person being a defaulter to the United States or to this state, or to any county or town therein, or to any state or territory within the United States, shall be eligible to any office of trust, profit or honor in this state."

Of course, it is true that if a public officer wilfully converts to his own use public moneys in his hands he is a defaulter, and the fact that he subsequently makes good the defalcation does not relieve him from prosecution and punishment for his offense. In this sense it is true that once a defaulter always a defaulter, but is this the sense in which the word is used in the section under consideration? The words

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are peculiar: "No person *being a defaulter to* the United States," etc., "shall be eligible." They indicate an apparent attempt to reach persons who at the time of the election are in a state of default to either of the public governmental agencies named, including noncriminal as well as criminal defaulters. Ordinarily speaking, an officer who, though once short in his accounts, has made the shortage good is not thereafter considered as "being a defaulter to" any branch of the government. Again, the section contains a special clause making ineligible any person "convicted of any infamous crime." Taking the whole section into consideration, the court is of opinion that the words "being a defaulter" in the section were intended to refer to persons presently in default, *i. e.* owing money received officially which they ought to but refuse to pay to some one of the governmental agencies named.

It results from these views that the judgment must be affirmed.

By the Court.—It is so ordered.

J. S. Stearns Lumber Company, Respondent, vs. Travelers Insurance Company, Appellant.

January 15—February 9, 1915.

Employers' liability insurance: Risks not covered: Injury caused by minor illegally employed: Defense by insurer of action against assured: Estoppel: Pleading: Waiver.

1. Under a policy insuring against loss by accidents to the employees of the assured, injuries caused by persons employed in violation of law were not within the risk insured against. In case of an accident the assured was to give notice to the insurer, with full information and particulars. Death of an employee was caused by negligence of a co-employee under sixteen years of age, employed without proper permit. The facts as to such illegal employment were not brought to the attention of the insurer, but it

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was told that the boy was over sixteen when employed, and it defended an action against the assured on account of said death. Incompetence of the boy was alleged in that action, and on that issue his mother testified that he was under sixteen, while he testified that he was over that age. There was no evidence as to whether or not he had a permit, no question as to the legality of his employment being raised. Other claims of negligence were made which were within the risk insured against. *Held*, that the insurer did not, by continuing to defend that action, estop itself from claiming, in a subsequent action by the assured on the policy, the benefit of the provision excepting from the risk accidents like that in question.

2. Employment of the boy under sixteen years of age without proper permit, in violation of ch. 338, Laws of 1909, being a misdemeanor, the presumption, from the standpoint of the insurer, was that the employment was legal, and evidence that he was under sixteen, with no evidence as to whether or not he had a permit, did not overcome that presumption.

3. An estoppel relied upon by plaintiff as the very groundwork of defendant's liability should be pleaded in the complaint, and if not so pleaded should be deemed to have been waived, at least where it would work hardship in that it would enrich plaintiff largely on account of acts of defendant which were but slightly, if at all, prejudicial to plaintiff.

4. Plaintiff's failure to plead estoppel in this case was not waived by defendant by failing to object to evidence under the complaint, substantially all facts alleged in the complaint being admitted, so that no evidence was necessary to prove them.

APPEAL from a judgment of the circuit court for Ashland county: G. N. RISJORD, Circuit Judge. *Reversed.*

Action on a policy of indemnity accident insurance. Plaintiff, a manufacturing company, purchased of defendant a policy of insurance against loss by accidents which might happen to its servants in the course of their employment. Thereby defendant, in case of such an accident, agreed:

1. Upon notice to investigate or settle the claim for damages in its discretion.

2. In the insured's name to defend against such claims if deemed best.

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3. To pay specified expenses and a stipulated percentage of the award of damages.

4. Injuries caused or sustained by persons employed in violation of law or the contract as to age not to be within the risk insured against.

5. The foregoing conditioned upon, in case of an accident immediate notice being given to the assurer, in manner indicated, with full information and particulars of any resulting claim and, in case of suit, all papers served being promptly forwarded to the assurer, and, upon its request, plaintiff aiding in settling the matter or contesting it.

6. No provision of the policy to be subject to waiver except by an indorsement on the policy signed by some one of specified persons.

June 21, 1911, while the policy was in force, defendant employed John Pikus, who, later while performing his duties, was fatally injured through negligence of a co-employee who was under the age of sixteen years, and, so, not legally employed unless he had a permit pursuant to the provisions of ch. 338, Laws of 1909. He did not have such permit. Defendant was notified of the accident; but not of the facts as to the alleged employment of the minor, nor of any matter in respect thereto. Defendant's adjuster made an investigation and was informed by the minor and also by plaintiff's representative that he was over sixteen years old when hired. Defendant relied thereon and the fact that no information to the contrary was furnished by plaintiff. Action was brought against the latter to recover damages on several grounds, including that of knowingly employing or retaining in service an incompetent employee whose conduct produced the death of the intestate. The complaint did not disclose the age of the employee. In due course, defendant performed its agreement as to carrying on the litigation in the name of the employer, and the latter assisted, as agreed; but did not bring to the former's attention the facts as to the illegal employment.

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There was conflicting evidence on the trial of the first action as to the minor's age. His mother testified that he was under sixteen years of age at the time of the accident, and he testified he was over that age. That was not regarded as important except as bearing on the question of incompetency. Nothing was said as to whether the boy was not legally employed by reason of not having the statutory permit. That had nothing to do with the issue tried. Plaintiff recovered. In due course, with approval of the employer, the cause was appealed to this court. Defendant continued to perform its contract. The judgment was affirmed. *O'Sullivan v. J. S. Stearns L. Co.* 154 Wis. 467, 143 N. W. 160. In the opinion the court, by mistake, supposing sub. 2, sec. 1728*a*, Stats., forbidding, absolutely, employment of minors of the age of the particular one in doing the kind of work he was engaged in when the accident occurred, was in force, referred thereto as if it applied to the case. It did not apply because of not being in existence until after the accident. The judgment was affirmed because the verdict as to negligent retention of the incompetent employee was sustained by the evidence. In due course, this action was brought for indemnity. The insurance company defended because of the accident having been caused by a person who was unlawfully employed.

The action was tried without a jury. Evidence was produced establishing facts substantially as stated, and this: During the investigation by defendant prior to the first action, it became informed of the facts, except as to the boy's age and his not having had a legal permit. The mother was not asked in respect thereto. It was informed by the employer that he was over sixteen years old and had a permit to work. It did not know the age of the boy until the mother testified on the trial of the first action. It had no knowledge, then, of the illegal employment. It continued to the end in control of the litigation on behalf of defendant.

It was agreed that judgment should go for defendant un-

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less it waived, or was estopped from defending upon the ground of, the illegal employment.

The trial court concluded that by continuing to defend the first action after notice of the age of the incompetent employee, without claiming immunity from the risk, defendant was estopped from invoking the benefit of the policy exception in its favor.

Judgment was rendered accordingly, and defendant appealed.

A. W. McLeod, for the appellant.

Geo. F. Merrill, for the respondent.

MARSHALL, J. The conclusion of the trial court that appellant became informed of the illegal employment by the mere suggestion of the boy's age by the mother on the trial of the first action, cannot be approved. The age of the minor was not an issue before. At best, the fact was then involved in conflicting evidence. The mother testified one way and the boy another. But, conceding that the mother's testimony was the best, and should have been believed, it did not settle the question of whether he was illegally employed. The vital fact of whether he had a legal permit, was not touched upon by the evidence. So the court was not warranted in finding the illegal employment was established and brought to appellant's attention on the first trial.

Employment of the minor without the proper permit, was a serious misdemeanor. It was punishable by fine or imprisonment. The presumption, from appellant's standpoint, was in favor of innocence. The mere evidence of the minor's age did not overcome that presumption, or very much affect it. So the basic feature of the recovery is wanting.

Again, assuming that the evidence of the boy's age was sufficient to put appellant upon inquiry, if the particular matter was vital to its interest, it was not in this case because the grounds of negligence were four in number. Had the claim-

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ant prevailed upon either of three, it would have been within the risks insured against. So, appellant was not, in any event, obliged to change its attitude toward respondent in the former action until judgment was rendered in the circuit court, grounded on the particular circumstance. Even that did not put appellant to its election because the presumption against violation of law still persisted in its favor.

Probably the learned circuit court was misled by the suggestion in 154 Wis. 467, 143 N. W. 160, as to the boy having been illegally employed. We must presume that, had it been appreciated that the law of 1909 ruled, the inadvertence here would not have created the difficulty which seems to have occurred.

The further point might well be considered fatal to respondent's case. It depended, in order to make out a case against appellant, upon estoppel. It had ample opportunity to plead it and should have done so as the very groundwork of liability. It did not do so. In such circumstances the estoppel is deemed waived.

While the rule suggested has been rather softened in recent years, and probably should be administered equitably,—not technically, when it comes to claiming the benefit of an estoppel by a person, which would work considerable hardship if successful, in that it would enrich the one invoking it largely on account of acts of another but slightly, if at all, prejudicial to that one, such person should be held pretty strictly to the doctrine of waiver and estoppel as to his own conduct.

It may be said that waiver of the right to insist upon estoppel, if there were one, by not pleading it, does not apply here because appellant waived that requisite by not objecting to evidence; but there was nothing to object to. Substantially all facts set forth in the complaint were admitted. No evidence was necessary to prove them. Evidence introduced simply substantiated the pleaded defense.

It must be appreciated that, in a case of this sort, the de-

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fendant does not lose his right by mere waiver. Valuable rights, involving large amounts of money, are not taken away by legal principles except upon substantial grounds. There may be mere waiver—action by one relied upon by another, and a change of attitude which does not involve any loss or prejudice to such other, whatever,—the intentional doing or failing to do an act with knowledge, actual or constructive, of the facts, involving voluntary relinquishment of a right, actually or constructively, within the knowledge of the relinquisher. That is one thing. *Pabst B. Co. v. Milwaukee,* 126 Wis. 110, 105 N. W. 563; *McNaughton v. Des Moines L. Ins. Co.* 140 Wis. 214, 224, 122 N. W. 764; *McDonald v. Markesan C. Co.* 142 Wis. 251, 256, 125 N. W. 444; *Will of Rice,* 150 Wis. 401, 468, 136 N. W. 956, 137 N. W. 778; *Somers v. Germania Nat. Bank,* 152 Wis. 210, 219, 138 N. W. 713. But it does not apply efficiently here, because there was neither knowledge, actual or constructive, of the facts. Had it been otherwise, and the other element of waiver existed, without some substantial element of estoppel, it would not have benefited respondent.

Counsel cite to our attention *Goodwillie v. London G. & A. Co.* 108 Wis. 207, 84 N. W. 164, which is merely to the effect that such a clause as that in question is a limitation of liability, taking the loss outside of the risks insured against. That is conceded in this case. The authority has nothing to do with any controverted matter.

In each of the adjudications cited to us, which deal with the particular matter, the element of estoppel was very prominent and upon that, instead of waiver, in the technical sense, the defense of illegal employment was held inefficient. *Tozer v. Ocean A. & G. Corp.* 94 Minn. 478, 103 N. W. 509; *Humes C. Co. v. Philadelphia C. Co.* 32 R. I. 246; *Royle M. Co. v. Fidelity & C. Co.* 126 Mo. App. 104, 103 S. W. 1098; *Employers' L. Ins. Corp. v. Chicago & B. M. C. & C. Co.* 141 Fed. 962; *Fairbanks C. Co. v. London A. Co.* 154

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Mo. App. 327, 133 S. W. 664; *Globe N. Co. v. Maryland C. Co.* 39 Wash. 299, 81 Pac. 826; *Glens Falls P. C. Co. v. Travelers' Ins. Co.* 162 N. Y. 399, 56 N. E. 897.

In the first of those cases the insurance company, from first to last, knew all the facts, yet insisted upon carrying on the litigation and neglected to notify the assured of an opportunity, which was presented, of making an advantageous settlement.

In the next case, the facts were all known to the insurance company, but, it, through mistake of law, supposed itself liable and handled the litigation to the practical exclusion of the employer.

In the next, with full knowledge of all the facts, the insurance company conceded its liability until the doors were fully closed for the assured, to do anything for protection in its own behalf.

In the last case, the insurance company took charge of the litigation and continued it down to the trial and then abandoned it under such circumstances as to leave defendant unable to make a defense and so the case went, practically, by default. Thus it will be seen that prejudicial features which operated, efficiently, in the many cases cited were entirely absent here.

Recapitulating, appellant did not have knowledge of the facts until after the first case was concluded. It was not obliged to search therefor, because respondent agreed to furnish the information thereof and it had a right to assume, until informed to the contrary, that respondent had not violated the law. The condition upon which respondent relied to estop appellant from having the benefit of its pleaded defense it created by not giving the former full information at the start; moreover, by misleading respondent as to the age of the boy and his having a permit. There is not, under the circumstances any presumption of prejudice to the interests of respondent because of its carrying on the litigation as it

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did. Especially is that so, since there were three grounds of liability insisted upon, which were within the risks insured against. There was no affirmative evidence of prejudice,—not a particle. The condition which respondent created may have caused appellant to defend the first action at considerable expense, when had it been fully informed, it would not have done so. The doctrine of estoppel applies quite clearly to respondent's position but not to appellant's.

By the Court.—The judgment is reversed, and the cause remanded with directions to dismiss with costs.

MILWAUKEE WESTERN FUEL COMPANY, Respondent, vs. INDUSTRIAL COMMISSION and another, Appellants.

January 15—February 9, 1915.

Workmen's compensation: Findings of industrial commission, when conclusive: Death: Accident or suicide? Evidence: Presumptions: Services incidental to employment.

1. Under sec. 2394—19, Stats. 1913, findings of fact by the industrial commission are conclusive if supported by the evidence, in any reasonable view thereof.
2. An employee who, after eating his luncheon on the employer's premises as was customary, started to walk along a passageway near the river bank towards a toilet provided for the use of employees and fell into the river and was drowned, was "performing services growing out of and incidental to his employment," within the meaning of sec. 2394—3, Stats., if he expected to resume his work when the lunching time expired.
3. A finding by the industrial commission in such case that the employee's death was caused by accident and not by wilful misconduct on his part in jumping into the water with intent to commit suicide, is *held* to be supported by evidence.
4. Effect may properly be given to the presumption against suicide, even though the evidence is not all consistent therewith.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This is an action by the plaintiff on an appeal from the

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finding of the *Industrial Commission* of the state of Wisconsin, which *Commission* awarded the defendant *Barbara Hartmann* compensation to be paid by the plaintiff for the death of her husband, George Hartmann, which occurred while he was in plaintiff's employ.

On May 29, 1913, George Hartmann was in the employ of the plaintiff. He met his death by drowning in the Menominee river. He was a man fifty-six years of age and had worked for the plaintiff company a number of years. The plaintiff's premises for conducting its fuel business were located on the Menominee river. On the morning of May 29th Hartmann left home to go to work, and finding it was raining he returned and got an umbrella. About 10 o'clock of the forenoon of that day the employees took a short time off for lunch, as was the usual custom. There were two or three toilets upon the premises and one of them was situated a few feet from the river front near the generator room. In order to reach this toilet men walk along a narrow passageway about seven feet wide between the buildings to the river and thence along the river a distance of about 220 feet. This toilet room was used by the employees of the company. During the lunch period on the 29th of May one of the employees, hearing a splash, looked out of the window and saw Hartmann in the water. He appeared to be making no struggle. Assistance was rendered him as soon as possible, but nothing could be done to save him. It was about three quarters of an hour from the time the splash was heard until the body was recovered. The plaintiff introduced evidence tending to show that Hartmann was demented,—that he had hallucinations or delusions. Clearly he had aberrations of some kind, but the testimony shows that he was perfectly sane about his work.

The *Industrial Commission* awarded compensation to the defendant *Barbara Hartmann* amounting to $2,259.11, payable in weekly instalments of $7.23, considering interest at three per cent. per annum.

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Upon appeal the circuit court set aside and vacated this order of the *Industrial Commission* and awarded costs against the defendant *Barbara Hartmann.* The circuit court held that it is incumbent on a claimant for compensation on account of the death of an employee, under the Workmen's Compensation Act, to show that death was caused by accident and that it resulted while the employee was in service growing out of or incidental to his employment. The court also held that the evidence "is as equally consistent with death by suicide as by accident. . . . The *Commission* seems to base its findings upon the presumption against suicide," and then determined the case against the claimant upon the following ground: "The court concludes that there is no evidence to support the finding that death was proximately caused by accident, and that therefore the award of the *Commission* must be vacated and set aside." Judgment awarded accordingly. This is an appeal from such judgment.

For the appellant *Industrial Commission* there were briefs by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.* They argued, among other things, that the presumption is that the drowning was accidental. *Krogh v. Modern Brotherhood,* 153 Wis. 397, 401, 141 N. W. 276; *Sorenson v. Menasha P. & P. Co.* 56 Wis. 338, 342, 14 N. W. 446; *Johns v. Northwestern M. R. Asso.* 90 Wis. 332, 335, 63 N. W. 276; *Pagel v. U. S. C. Co.* 158 Wis. 278, 148 N. W. 878; *Butero v. Travelers' Acc. Ins. Co.* 96 Wis. 536, 540, 71 N. W. 811; *Henry Steers, Inc. v. Dunnewald,* 85 N. J. Law, 449, 89 Atl. 1007; *Lee v. Stag Line,* 56 Sol. Jour. 720, 5 Butterworth's Workm. C. C. 660; *Mackinnon v. Miller,* 46 Scot. Law Rep. 299, 2 Butterworth's Workm. C. C. 64; *Southall v. Cheshire Co. N. Co.* 5 Butterworth's Workm. C. C. 251; *Richardson v. Ship Avonmore,* 5 Butterworth's Workm. C. C. 34; *Steamship Swansea Vale v. Rice,* 27 T. L. Rep. 440, 4 Butterworth's Workm. C. C. 298; *Ayr S. S. Co. v. Lendrum,* 50 Scot. Law Rep. 173, 6 Butterworth's Workm. C. C. 326, 338;

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Furnivall v. Johnson's I. & S. Co. 5 Butterworth's Workm. C. C. 43; 1 May, Ins. (4th ed.) § 325. No different presumption should be indulged in where the proceeding is under the Workmen's Compensation Act than when it is an action upon an insurance policy. *Sadowski v. Thomas F. Co.* 157 Wis. 443, 447, 146 N. W. 770; *Young v. Duncan,* 218 Mass. 346, 106 N. E. 1. In an action upon an accident insurance policy this court has said that the presumption that the death was caused by accident properly applies where there is no evidence to show the circumstances and manner in which the injuries were inflicted. *Butero v. Travelers' Acc. Ins. Co.* 96 Wis. 536, 540, 71 N. W. 811. See, also, Boyd, Workm. Comp. § 447 and cases cited; *Muzik v. Erie R. Co.* 85 N. J. Law, 129, 89 Atl. 248; *Pomfret v. L. & Y. R. Co.* 19 T. L. Rep. 649, 5 Workm. C. C. 22. If Hartmann's falling into the water was due to fits, vertigo, or other temporary physical trouble, it still would be accidental. 1 Bradbury, Workm. Comp. (2d ed.) 360 *et seq.* and cases cited; *Manufacturers' A. I. Co. v. Dorgan,* 58 Fed. 945, 954, 22 L. R. A. 620, 625; *Winspear v. Accident Ins. Co.* 6 Q. B. D. 42. And whether or not his death was accidental was a question of fact. Boyd, Workm. Comp. § 573; *McCloskey v. Kirk* (Pa.) 90 Atl. 73; 1 May, Ins. (4th ed.) § 325, cited with approval in *Johns v. Northwestern M. R. Asso.* 90 Wis. 332, 335, 63 N. W. 276. Under the circumstances of this case Hartmann was performing services incidental to and growing out of his employment. *Zabriskie v. Erie R. Co.* 85 N. J. Law, 157, 88 Atl. 824; *Elliott v. Rex,* 116 L. T. Jour. 314, 6 Workm. C. C. 27; *Lawless v. Wigan C. & I. Co.* 124 L. T. Jour. 532, 1 Butterworth's Workm. C. C. 153; *Bryant v. Fissell,* 84 N. J. Law, 72, 86 Atl. 458; *Clem v. Chalmers M. Co.* 178 Mich. 340, 144 N. W. 848, 850; *Rayner v. Sligh F. Co.* (Mich.) 146 N. W. 665; *Andrejwski v. Wolverine C. Co.* (Mich.) 148 N. W. 684; *Sadowski v. Thomas F. Co.* 157 Wis. 443, 449, 146 N. W. 770; *Milwaukee v. Miller,* 154 Wis. 652,

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144 N. W. 188; *Terlecki v. Strauss,* 85 N. J. Law, 454, 89 Atl. 1023; *Blovelt v. Sawyer,* [1904] 1 K. B. 271, 6 Workm. C. C. 16; *Earnshaw v. L. & Y. R. Co.* 115 L. T. Jour. 89, 5 Butterworth's Workm. C. C. 28; *Morris v. Lambeth B. Council,* 22 T. L. Rep. 22, 8 Workm. C. C. 1; *Rowland v. Wright,* 24 T. L. Rep. 852, 1 Butterworth's Workm. C. C. 192; Boyd, Workm. Comp. § 481; 1 Bradbury, Workm. Comp. (2d ed.) 444–448, 450, 451.

Michael Levin, for the appellant *Barbara Hartmann,* to the point that the finding that Hartmann's death was proximately caused by accident and not by wilful misconduct is warranted by the evidence, cited *Peterson v. Time Ind. Co.* 152 Wis. 562, 140 N. W. 286; *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 29, 31; Black, Law Dict. "Accident;" *Bryant v. Fissell,* 84 N. J. Law, 72, 86 Atl. 458; *Boody v. K. & C. M. Co.* (N. H.) 90 Atl. 859; *DeFazio's Estate v. Goldschmidt D. Co.* (N. J.) 88 Atl. 705; *Losh v. Evans & Co.* 19 L. T. Rep. 142, 5 Workm. C. C. 17; *Astley v. R. Evans & Co.* [1911] 1 K. B. 1036, 4 Butterworth's Workm. C. C. 209; *Grant v. G. & S. W. R. Co.* 45 Scot. Law Rep. 128, 1 Butterworth's Workm. C. C. 17; *Fennah v. M. & G. W. R'y,* 45 Irish L. T. 192, 4 Butterworth's Workm. C. C. 440; *Mitchell v. Glamorgan C. Co.* 23 T. L. Rep. 588, 9 Workm. C. C. 16; *Lee v. Stag Line,* 56 Sol. Jour. 720, 5 Butterworth's Workm. C. C. 660; *Devan v. Commercial T. M. A. Asso.* 157 N. Y. 690, 51 N. E. 1090; *Knickerbocker Cas. Ins. Co. v. Jordan,* 7 Weekly Bul. 71, 10 Am. Law Rep. 695; *Peele v. Provident F. Soc.* 147 Ind. 543, 44 N. E. 661, 46 N. E. 990; *U. S. M. A. Asso. v. Hubbell,* 56 Ohio St. 516, 47 N. E. 544, 40 L. R. A. 453; *Geoghegan v. Atlas S. S. Co.* 146 N. Y. 369, 40 N. E. 507. He also cited, to the point that Hartmann was performing services growing out of and incidental to his employment, *Milwaukee v. Althoff,* 156 Wis. 68, 145 N. W. 238; *Neice v. Farmers' C. C. & S. Co.* 90 Neb. 470, 133 N. W. 878; *Bryant v. Fissell,* 84 N. J. Law,

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72, 86 Atl. 458; *Moore v. Manchester Liners,* [1910] App. Cas. 498, 500, 507.

For the respondent there was a brief by *Doe, Ballhorn & Wilkie,* and oral argument by *J. B. Doe.* They contended, *inter alia,* that it is essential under the statute that the applicant for compensation *prove* that the death of Hartmann was *proximately* caused by accident. If "proximately" is construed in its ordinary legal meaning, it is necessary that the applicant prove that the death was caused by an accident due to negligence on the part of the employer and that it was the natural and probable result of such negligence. There is no evidence in the case to support a finding that Hartmann was accidentally drowned, or that when the occurrence happened he was engaged in performing service growing out of and incidental to his employment. They cited, among other cases, *Hansen v. Milwaukee C. & G. Co.* 155 Wis. 235, 144 N. W. 289; *Craske v. Wigan,* 101 L. T. Rep. 6, 25 T. L. Rep. 632, 2 Butterworth's Workm. C. C. 35; *Amys v. Barton,* 105 L. T. Rep. 619, 28 T. L. Rep. 29, 5 Butterworth's Workm. C. C. 117; *Rodger v. Paisley S. Board,* 49 Scot. Law Rep. 413, 5 Butterworth's Workm. C. C. 547; *Brice v. Lloyd,* 101 L. T. Rep. 482, 25 T. L. Rep. 759, 2 Butterworth's Workm. C. C. 26; *Smith v. L. & Y. R. Co.* 79 L. T. Rep. 633, 15 T. L. Rep. 64, 1 Workm. C. C. 1; *Henry Steers, Inc. v. Dunnewald,* 85 N. J. Law, 449, 89 Atl. 1007.

SIEBECKER, J. The contention that the parties were not subject to the Workmen's Compensation Act must fail. The record contains a copy of plaintiff's notice to the *Industrial Commission* dated November 30, 1912, accepting the provisions of the act. The record also discloses that the plaintiff took part in the proceedings before the *Commission* without claiming exemption. It seems that plaintiff throughout the hearing acted upon the fact that it was subject to this law. We see no force in the claim that the *Commission* had

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no grounds for concluding that the parties before it had not accepted the provisions of the Compensation Act and that it did not appear that the *Commission* had jurisdiction in the matter.

It is contended that the record does not sustain the *Commission's* finding: "That at the time of said accident resulting in the death of said George Hartmann by drowning, said George Hartmann was performing services growing out of and incidental to his employment." *Henry Steers, Inc. v. Dunnewald,* 85 N. J. Law, 449, 89 Atl. 1007. The circuit court did not reverse this finding for want of any evidence to sustain it. Sec. 2394—19, Stats. 1913, provides:

"The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive; and the order or award . . . shall be subject to review only . . ." by action against the commission in the Dane county circuit court.

"Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only on the following grounds:

"(1) That the commission acted without or in excess of its powers.

"(2) That the order or award was procured by fraud.

"(3) That the findings of fact by the commission do not support the order or award."

In the case of *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209, the court, in speaking of the effect of the *Commission* findings of facts, stated:

"We regard the expression 'without or in excess of its powers' as substantially the equivalent, or at least as inclusive, of the expression, 'without or in excess of its jurisdiction,' as those words are used in *certiorari* actions to review the decisions of administrative officers or bodies."

In *International H. Co. v. Industrial Comm.* 157 Wis. 167, 147 N. W. 53, the *Borgnis* and other cases are referred to as

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illustrative of the interpretation this court has given this part of the act and that the rule governing courts in *certiorari* cases is controlling here, and it is further declared:

"The rule in *certiorari* cases is that, if in any reasonable view of the evidence it will support the conclusion arrived at, such conclusion will not be disturbed for want of support in the evidence. If, however, the finding has no support in the testimony, there was no jurisdiction to make it [citing]." *Hoenig v. Industrial Comm., post,* p. 646, 150 N. W. 996.

Testing the instant case under this rule we are of the opinion that the facts warrant the inference that Hartmann on the day of his drowning went to his employment as usual and performed his services until the forenoon lunching hour and then partook of a lunch on the premises, as was customary in the conduct of plaintiff's business, that he walked from his lunching place to the margin of the river and thence along a passageway between plaintiff's building and the river's edge, going toward a toilet which was for use by employees, and that he accidentally fell into the water before he arrived at the toilet. All the circumstances and facts tend to show that up to this time he expected to resume his work when lunching time had expired, and hence he was within the scope of his service when walking at this place. The *Commission* believed that Hartmann was on his way to this toilet. This seems to us a natural and reasonable inference. This, under the evidence, can be reasonably denied only if it appears that he had in fact left his employment when he went to this place with the intent to commit suicide by drowning in the river. It follows that this finding of the *Commission* is supported by the evidence unless it is shown that he had left his service in going from where he lunched to the place from which he was precipitated into the water, with the intent to commit suicide by drowning. This presents the inquiry, Is the *Commission's* finding "that the death of said George Hartmann was proximately caused by accident and was not caused by wilful

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misconduct," without support in the evidence, as determined by the circuit court? The *Commission* in a memorandum attached to the award made a full and fair statement of the evidentiary facts of the case forming the basis for their inference that Hartmann came to his death by accident and that it was not caused by his wilful misconduct in jumping into the water with intent of committing suicide, as claimed by the plaintiff. The *Commission* observes that, leaving his mental condition out of consideration, all the other facts tend to support and show convincingly that his death was purely accidental, and that "there is nothing in the evidence that points to suicide unless it be that he was suffering mentally, but to our minds the result of his mental suffering is equally as consistent with accident as with suicide. He had no suicidal mania. He simply appeared worried and melancholy over what seemed to him to be persecution on the part of his associates." It is also noteworthy that his mental state in no way interfered with his ability to perform his daily tasks as well as before, nor appeared seriously to disturb him in his family or his business relations. The *Commission* state that they acted upon the rule of law, "Where death occurs under such circumstances that it may or may not have been caused by suicide it will be presumed to have been unintentional." They then follow this by stating in substance and effect that, regardless of this presumption, by the facts and circumstances of the case they "are forced to the conclusion that Hartmann came to his death by accident." We refer to the *Commission* report and its action in the case to this extent to show on what basis therein determination of the question rested, and we do not consider further elaboration of this phase of the case is required. Their inferences from the evidentiary facts are logical and harmonize with reason in the light of common knowledge and experience in daily affairs. In the field of inferences from evidentiary facts their action is final and controlling under the authority conferred upon them by law, un-

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less it appears that there is no reasonable basis for their conclusions under the facts and circumstances before them and thus rendering their action without or in excess of their powers.

The trial court approached the case from the viewpoint stated in its decision:

"The evidence in the case is as equally consistent with death by suicide as by accident. There is no direct evidence that the deceased fell into the water by accident. His conduct in the water as well as his mental disturbances before his death are more consistent with suicide than with accident. The *Commission* seems to base its finding upon the presumption against suicide. A presumption is not evidence. It is only the result of or inference from evidence. When the evidence is not consistent with the presumption it has no force in the case."

We are persuaded that the court erred in its final conclusion in reversing the *Commission* in two respects. First, in its finding of fact that there was no evidence sustaining the *Commission's* finding that Hartmann's death was proximately caused by accident and was not caused by wilful misconduct. We have heretofore adverted to this question and we are persuaded that there is evidence sustaining the *Commission's* finding thereon, and hence it was error for the court to disturb it. Secondly, the court, as we understand its opinion, held that the *Commission* erred by giving effect to the presumption against suicide in arriving at its conclusion. The court declared: "When the evidence is not consistent with the presumption it has no force in the case." We are led to believe that this is error and that it misled the court, for it states, "the evidence in the case is equally consistent with death by suicide as by accident." If this view of the evidence in the case were correct, then by necessary implication there is some evidence to sustain the *Commission* and its finding must stand. But has the presumption against suicide no force in the case when the evidence is not consistent with it? The presumption has the usual legal effect

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given to presumptions, namely, of calling for proof of the fact which it negatives; that is what is meant when the courts say, as this court said in *Sorenson v. Menasha P. & P. Co.* 56 Wis. 338, 342, 14 N. W. 446:

"The presumption . . . that the deceased committed *suicide,* cannot be indulged in as a mere presumption, without any fact or circumstance upon which it can be logically predicated; for the presumption of the law is in favor of life, and the natural desire and struggle to preserve rather than to destroy it. The presumption is that he [plaintiff's intestate] fell into the hole accidentally, and perhaps carelessly."

These observations were applied in a case brought to recover for the negligent killing of a person while in the employ of the defendant, where there was no direct evidence to show the proximate cause of death. To the same effect is the presumption against suicide in insurance cases, namely, it calls for proof of the fact of suicide, which it negatives. This is because, as stated in the *Sorenson Case,* in human experience it is the common desire and effort to preserve life rather than destroy it, and hence the law, where a person is found dead, imputes to the circumstances the *prima facie* significance that death was caused by accident rather than suicide, and that presumption persists in its legal force to negative the fact of suicide until overcome by evidence. This rule was approved in *Johns v. Northwestern M. R. Asso.* 90 Wis. 332, 63 N. W. 276. The court there states:

"Counsel for the plaintiff is undoubtedly correct in contending that 'when the dead body of the insured is found under circumstances, and with such injuries, that the death may have resulted from negligence, accident, or suicide, the presumption is against suicide, as contrary to the general conduct of mankind.' May, Ins. § 325. Whether the death is accidental or intentional, whenever there is any evidence bearing upon the point, is a question of fact for the jury or court. *Ibid.* It is only essential that the evidence preponderates against the presumption of accident."

See, also, *Krogh v. Modern Brotherhood,* 153 Wis. 397,

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141 N. W. 276, and cases cited. It is manifest that the circuit court erred in holding that there is no evidence in the record which sustains the finding of the *Commission* upon either of the questions of fact embraced in the *Commission's* findings to justify the award made.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court with directions to enter a judgment affirming the award of the *Industrial Commission.* No costs will be allowed in this court, except that the respondent pay the clerk's fees.

MARSHALL, J., dissents.

HOENIG, Appellant, vs. INDUSTRIAL COMMISSION and another, Respondents.

January 15—February 9, 1915.

Workmen's compensation: What injuries compensated: Statute construed: Lightning stroke: Ordinary hazard: Findings of fact, when conclusive.

1. Injuries to employees for which compensation is to be paid under the Workmen's Compensation Act (secs. 2394—1 to 2394—31, Stats. 1913) are such as are incidental to and grow out of the employment. They do not include an injury caused by lightning where the exposure to the hazard from lightning stroke was not peculiar to the industry or rendered exceptionally great by the employment.
2. A finding by the industrial commission in this case that an employee killed by lightning while working on a dam on a river was not exposed to a hazard from lightning peculiar to the industry or differing substantially from the hazard from lightning in any outdoor work, is supported by the evidence.
3. Findings of fact by the industrial commission are not to be disturbed where there is any substantial basis for them in the evidence.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an appeal from a judgment affirming the findings

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and order of the respondent *Industrial Commission of Wisconsin* dismissing the application of the appellant for compensation from the respondent *Lindauer-O'Connell Company* by reason of the death of her husband, John Hoenig. John Hoenig was employed by the respondent *Lindauer-O'Connell Company,* and while so employed and on August 8, 1913, was struck by lightning and killed. The question involved is whether the order of the *Industrial Commission* should be disturbed.

For the appellant the cause was submitted on the brief of *Albert H. Krugmeier.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

For the respondent *Lindauer-O'Connell Company* the cause was submitted on the brief of *Brown, Pradt & Genrich.*

KERWIN, J. The court below in affirming the findings of the *Industrial Commission* held that the Workmen's Compensation Act "limits compensation to those cases in which the accident grows out of the hazards of industrial enterprises and is peculiar to such enterprises;" and further held that "an injured employee is entitled to compensation when the industry combines with the elements in producing an injury by a lightning stroke;" and further found that it could not be said that there was not a substantial basis for the finding in the evidence taken before the *Commission.*

We are inclined to agree with the learned court below in its conclusions and judgment in the case.

It is insisted by counsel for appellant that there is no basis for the findings of the *Commission.* The *Commission* found that the deceased, John Hoenig, was in the employ of the respondent the *Lindauer-O'Connell Company,* and while performing services growing out of and incidental to his employment, at work on a dam on the Fox river in Wisconsin, received a stroke of lightning which resulted in his death;

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that at the time and place when and where said Hoenig came to his death it had been raining and the rain was accompanied by thunder and lightning; that at said time and place deceased was not exposed to a hazard from lightning stroke peculiar to the industry or differing substantially from hazard from lightning stroke of any ordinary outdoor work; that the death of Hoenig was not proximately caused by accident within the meaning of ch. 599, Laws of 1913 (secs. 2394—1 to 2394—31, Stats. 1913).

It is first insisted by counsel for appellant that under the Wisconsin Compensation Act liability exists for an injury caused by lightning to an employee in the course of his employment, irrespective of whether the industry combines with the elements in producing the injury, on the ground that the statute expressly gives compensation where three facts exist, namely: (1) that the employer and employee are under the act; (2) that the employee was performing services growing out of and incidental to his employment; and (3) that the injury was proximately caused by accident, not intentionally self-inflicted.

The contention of appellant is that the statute is plain and that there is no room for construction; that where the three facts named exist compensation follows as matter of right under the act.

The act should be construed in the light of the history of its passage. Pursuant to ch. 518, Laws of 1909, a committee was appointed which investigated and presented a report to the legislature of 1911. This report tends to show the construction placed upon the act by the committee and that it was not intended to include other than industrial accidents or "hazards incident to the business." *Minneapolis, St. P. & S. S. M. R. Co. v. Industrial Comm.* 153 Wis. 552, 141 N. W. 1119.

It seems quite clear that the injuries for which compensation is to be paid, under the act, are such as are incidental to

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and grow out of the employment. *Minneapolis, St. P. & S. S. M. R. Co. v. Industrial Comm., supra; Milwaukee v. Miller,* 154 Wis. 652, 144 N. W. 188; *Rayner v. Sligh F. Co.* (Mich.) 146 N. W. 665; *McNicol's Case,* 215 Mass. 497, 102 N. E. 697; *Bryant v. Fissell,* 84 N. J. Law, 72, 86 Atl. 458; *Kelly v. Kerry Co. Council,* 42 Irish L. T. 23.

The question, therefore, arises whether the injuries received by Hoenig were incident to and grew out of the employment. This proposition turns upon the nature of the hazard to which deceased was exposed at the time and place of injury. Was he exposed to a hazard from lightning stroke peculiar to the industry? The *Industrial Commission* held that he was not, and that the exposure to hazard from lightning stroke at the time and place of injury was not different, substantially, from that of the ordinary out-of-door work. The court below affirmed the findings of the *Industrial Commission.* True, the court in its findings said that if the case were presented to it for a finding from the evidence it would not make the finding which was made by the *Commission,* and further found that a careful review of the evidence led the court to conclude that it could not say that there was not substantial basis for the finding of the *Commission* in the evidence taken before it.

It is well settled both on principle and authority that the findings of the *Commission* should not be disturbed where there is any substantial basis for them in the evidence. *Northwestern I. Co. v. Industrial Comm.* 154 Wis. 97, 142 N. W. 271; *International H. Co. v. Industrial Comm.* 157 Wis. 167, 147 N. W. 53; *Milwaukee Western F. Co. v. Industrial Comm., ante,* p. 635, 150 N. W. 948; *Nekoosa-Edwards P. Co. v. Industrial Comm.* 154 Wis. 105, 141 N. W. 1013; sec. 2394—19, Stats. 1913.

Counsel for appellant appears to rely with confidence upon *Andrew v. Failsworth Ind. Soc.* 90 L. T. Rep. 611. An examination of that case, however, will show that it differs quite ma-

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terially in its facts from the instant case. There the position of the injured person, as shown by the evidence, was much more hazardous because of the employment than ordinarily. Moreover in that case the finding of the county judge awarding compensation was affirmed.

In the case now before us there was substantial basis in the evidence for the finding of the *Commission* to the effect that there was no hazard incident to or growing out of the employment substantially different from that of ordinary out-of-door work during a thunder storm accompanied by rain.

The *Commission* in its opinion said:

"There was testimony in this case of an expert nature for the purpose of showing that the employment of deceased at the water's edge was peculiarly dangerous from exposure to lightning. This evidence does not convince the *Commission* to a moral certainty that the employment was extrahazardous in this regard. It is admitted that the action of lightning is extremely freakish, and while it is more or less controlled by general law, there are so many different elements entering into its control that we do not think the evidence in this case established that the deceased was in any position of exceptional danger because of the possibilities of lightning stroke."

Sec. 2394—19, Stats. 1913, provides:

"The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive; . . . the same shall be set aside only upon the following grounds: (1) that the commission acted without or in excess of its powers; (2) that the order or award was procured by fraud; (3) that the findings of fact by the commission do not support the order or award."

Upon the record in this case we are convinced that the judgment of the court below must be affirmed.

By the Court.—The judgment appealed from is affirmed.

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HYDE, Plaintiff in error, vs. THE STATE, Defendant in error.

January 15—February 9, 1915.

Constitutional law: Freedom of speech: Criminal slander: Evidence: Instructions to jury: Harmless errors.

1. **Sub. 2, sec. 4569, Stats., making it a misdemeanor for one person to slander another, is not an abridgment of freedom of speech as guaranteed by sec. 3, art. I, Const.**
2. **In a prosecution under sub. 2, sec. 4569, Stats., it is not necessary to prove that the reputation of the slandered person was in fact injured or impaired, it being sufficient that the slanderous words "expose him to hatred, contempt, or ridicule."**
3. **It is sufficient for a conviction in such a case that a substantial portion of the words charged in the information be proved to have been spoken substantially as charged, although there may be slight differences in the form of expression.**
4. **The mere fact that an instruction was somewhat confused in its language is immaterial where it must have been understood by the jury in its proper sense.**

ERROR to review a judgment of the municipal court of Brown county: N. J. MONAHAN, Judge. *Affirmed.*

The plaintiff in error seeks to reverse a judgment of conviction under sub. 2 of sec. 4569 of the Statutes, which reads as follows:

"Every person who, in the presence and hearing of another, other than the person slandered, whether he be present or not, shall maliciously speak of or concerning any person, any false or defamatory words or language which shall injure or impair the reputation of such person for virtue or chastity or which shall expose him to hatred, contempt, or ridicule shall be guilty of a misdemeanor for which said person shall be punished as heretofore provided in subsection 1. Every slander herein mentioned shall be deemed malicious if no justification therefor be shown and shall be justified when the language charged as slanderous, false, or defamatory was true and was spoken with good motives and for justifiable ends."

The punishment provided by the law for violation of this subsection is imprisonment in the county jail not more than

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one year or fine not exceeding $250. The plaintiff in error was fined $50 and costs, amounting in all to $128.78. The words charged to have been used by the plaintiff in error were words ascribing to one Cunningham acts of obscene degeneracy, which it is unnecessary to print. Three witnesses testified to a substantial part though not the entire language charged, while the defendant and one witness testified to the contrary.

Exception was taken by the defendant to the following paragraph of the judge's charge:

"To authorize a verdict of guilty in this case it is not necessary that all the slanderous words alleged in the information should be proved, and in this case if the jury believe from the evidence that a sufficient number of words charged in the information and the charge of immoral conduct against Edward P. Cunningham to have been proved as spoken by the defendant as charged in the information beyond all reasonable doubt, then the jury should find the defendant guilty."

C. W. Lomas, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *J. T. Dithmar,* assistant attorney general, attorneys, and *M. E. Davis,* district attorney, of counsel, and oral argument by *Mr. Dithmar.*

WINSLOW, C. J. In this case it is held:

1. The statute in question is not an abridgment of freedom of speech as guaranteed by the constitution. Freedom of speech does not include license to slander.

2. It is not necessary in a prosecution under this statute to prove that the reputation of the slandered person was in fact injured or impaired. If the slanderous words "*expose* him to hatred, contempt, or ridicule" the offense is committed. This is the plain reading of the statute and in analogy to the law of criminal libel.

3. The instruction excepted to was somewhat confused in its language, but under the evidence could not have misled the jury. It must have been understood to mean that if a

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substantial portion of the words charged in the information were proven substantially as charged, it would be sufficient though there might be slight differences in the form of expression. This is a correct statement of the law. *Kloths v. Hess,* 126 Wis. 587, 106 N. W. 251; *Earley v. Winn,* 129 Wis. 291, 109 N. W. 633; *Greeler v. Redmond,* 154 Wis. 503, 143 N. W. 152.

By the Court.—Judgment affirmed.

STATE EX REL. JOHNSON, State Treasurer, vs. MAURER, County Treasurer.

January 15—February 9, 1915.

Constitutional law: School fund: Proceeds of fines: Fish and game laws.

That part of ch. 525, Laws of 1909 (sec. 4567*m*, Stats.), which provides that one third of the fines collected for violations of the fish and game laws shall be paid to the county treasurer and set apart as a fund for the protection of fish and game, is void because in conflict with sec. 2, art. X, Const., which provides that "the clear proceeds of all fines collected in the several counties for any breach of the penal laws" shall go to the school fund.

THIS is a proceeding brought in this court by the allowance of an alternative writ of *mandamus* directed to the defendant as county treasurer of Taylor county, commanding him to pay over to the state treasurer the sum of $290.03, being part of the fines and penalties collected in criminal prosecutions in Taylor county, or show cause why he should not do so. The petition showed that certain fines were collected in said county in prosecutions for violations of the fish and game laws, and the defendant justified his retention of one third of the fines so collected under ch. 525, Laws of 1909, being sec. 4567*m*, Stats. This law reads as follows:

"One third of the fines imposed and collected under the laws regulating the taking, killing, having in possession, or

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transportation of fish and game, including the violations of the acts relative to the granting and holding of licenses to hunt certain game, shall be paid by the magistrate to the person informing of the offense and prosecuting the offender to conviction, one third shall be paid by the magistrate before whom the matter shall have been tried and the fines imposed to the county treasurer, and shall be by him designated and set apart as a fund for the protection of fish and game to reimburse the county for the moneys which it shall expend for the enforcement of the fish and game laws, and the remainder shall go to the school fund as provided by law."

Sub. (5) of sec. 715 of the Statutes provides that it shall be the duty of the county treasurer

"To transmit to the state treasurer at the time he is required by law to pay the state taxes a particular statement, verified by his affidavit indorsed upon or attached thereto, of all moneys received by him during the preceding year and which are payable to the state treasurer for licenses, fines, penalties, or on any other account, and at the same time pay to the state treasurer the amount thereof after deducting the legal fees."

Sec. 2 of art. X of the state constitution, among other things, provides as follows:

"The clear proceeds of all fines collected in the several counties for any breach of the penal laws . . . shall be exclusively applied to the following objects, to wit:

"1. To the support and maintenance of common schools in each school district, and the purchase of suitable libraries and apparatus therefor.

"2. The residue shall be appropriated to the support and maintenance of academies and normal schools, and suitable libraries and apparatus therefor."

It is the contention of the state that so much of ch. 525, Laws of 1909, above quoted, as permits counties to retain one third of the fines collected is void because in conflict with the provisions of sec. 2, art. X, of the constitution, and that the moneys retained under the provisions of the 1909 law

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should be paid into the state treasury for the purposes designated in the constitution. This contention presents the sole question involved in the case.

For the plaintiff there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

For the defendant the cause was submitted on the brief of *John B. Hagarty.*

BARNES, J. It seems clear that the sum retained by the county treasurer of Taylor county is a part of the "clear proceeds" received from fines imposed in prosecutions for violations of our fish and game laws, and that so much of ch. 525, Laws of 1909 (sec. 4567*m,* Stats.), as permitted the county treasurer to retain this money for the purposes specified in the statute is unconstitutional and void because it conflicts with sec. 2 of art. X of our constitution. *Lynch v. Steamer Economy,* 27 Wis. 69.

By the Court.—Ordered that the peremptory writ prayed for issue.

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ACTION.

By whom brought: Who may maintain. See EJECTMENT, 1. MARRIED WOMEN. RAILROADS, 7.

Same: Taxpayers' action: Nonresident taxpayer. See ACTION, 5. TOWNS, 4, 8, 10.

1. The question whether nonresident taxpayers of a town can maintain an action against the town and the holders of town orders alleged to be invalid, to set aside and annul such orders, is properly raised by answer setting up nonresidence and averring want of capacity to sue. *Menasha W. W. Co. v. Winter,* 437

2. The wasting, by unlawful expenditure, of public funds raised by taxation is a wrong which affects resident and nonresident taxpayers alike, and either can maintain an action to redress the wrong. *Ibid.*

At law or in equity?

3. Objection to an action by taxpayers to restrain the payment of illegal town orders, on the ground that the plaintiffs have an adequate remedy at law by paying the tax levied therefor under protest and suing for its recovery, or by an equitable action to remove the cloud upon their property created by the illegal tax, is not well founded, since a resort to either of those remedies would result in creating a deficit toward which they would have to contribute. Only by enjoining the payment of an illegal order can complete immunity be had against the illegality. *Menasha W. W. Co. v. Winter,* 437

4. The levy of an illegal tax, the letting of contracts in contemplation of its collection, and the doing of work and issuance of town orders thereunder, presents more than a mere contemplated or threatened injury to taxpayers, and shows an existing equitable cause of action in their favor. *Ibid.*

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Joinder of causes of action.

5. Under sec. 2647, Stats., a cause of action for damages in favor of plaintiff personally cannot properly be united with a cause of action in favor of himself and all other taxpayers similarly situated, as a class, to restrain certain acts of public officers or employees. *Tyre v. Krug,* 39

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ADVERSE POSSESSION.

See MORTGAGES, 3, 4.

1. Whether a certificate of heirship issued *ex parte* by the county judge at chambers, as authorized by sec. 2276*a*, Stats., is a "judgment of a competent court" within the meaning of sec. 4211, is doubted. *Bourne v. Wiele.* 340
2. Where such a certificate was to the effect that land of a decedent belonged in equal parts to nine persons (naming them) as his heirs, subject to the dower right of the widow, a quitclaim deed given by said nine persons to the widow and which, construed with the certificate, purported to convey the whole title, was a written instrument upon which adverse possession might be based under sec. 4211, Stats. *Ibid.*
3. It appearing that there were other heirs of the decedent who were not named in said certificate, but that neither the widow nor her subsequent grantees of the land had ever known of their existence and that, prior to the commencement of the action by said other heirs, the widow and her said grantees (defendants in the action) had occupied and possessed the land for more than ten years, claiming title under said quitclaim deed adversely to any other right, the defendants were properly held to have acquired title by adverse possession. *Ibid.*

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APPEAL AND ERROR.

Decisions reviewable. See CERTIORARI.

Right to review: Persons entitled. See TAXATION, 14.

Exceptions. See ASSAULT AND BATTERY, 2.

1. No exception to a mere conclusion of law is ever necessary. *Foote v. Foote,* 179
2. Thus, although the findings of the trial court were not excepted to and there is no bill of exceptions, so that the only question is whether the judgment appealed from is sustained by the pleadings and the findings, a fact appearing from the pleadings without dispute and the question whether, in view of that fact, the conclusion of law on which the judgment is based is correct, are fairly before the appellate court. *Ibid.*

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3. Even were an exception technically necessary in such a case, the supreme court might nevertheless, under sec. 2405*m*, Stats., decide the question on the merits. *Ibid.*

4. A new trial having been ordered when the complaint should, instead, have been dismissed, upon an appeal by the plaintiff the order is reversed and a judgment dismissing the complaint is directed, although the defendant did not except to the order or appeal therefrom. *Pietsch v. McCarthy*, 251

Briefs: Disrespectful language.

5. Language used in a brief in this case is condemned as a flagrant violation of professional ethics and of the duty and respect which attorneys owe to courts; and the brief is stricken from the files. *Casper v. Kalt-Zimmers Mfg. Co.* 517

Review: Findings, when disturbed. See WORKMEN'S COMPENSATION ACT, 4–6.

6. Conclusions of fact reached by wrong application of legal principles do not fall within the rule which prohibits this court from disturbing the trial court's findings of fact unless they are against the clear preponderance of the evidence. *McMillen v. Strange*, 271

7. The decision of the trial court as to whether the evidence presents a jury question will not be disturbed on appeal unless it appears to be clearly wrong. *Hewitt v. Southern Wis. R. Co.* 309

8. Where the evidence raises a jury question and the trial court has refused to exercise its discretion to grant a new trial, the findings of the jury are conclusive. *Ibid.*

Same: Affirmance and reversal: Material and immaterial errors. See APPEAL, 4. ASSAULT AND BATTERY, 2. CARRIERS, 16. FRAUD, 2–4. HOMICIDE, 3, 4. INSTRUCTIONS TO JURY, 2–7, 10. JURY. LANDLORD AND TENANT, 8, 9. LIBEL AND SLANDER, 4, 5, 7, 8. NEGLIGENCE, 7, 9, 12. RAILROADS, 19, 20. STREET RAILWAYS, 1, 2. TOWNS, 5. TRIAL, 1, 4–8, 10, 11.

9. Where a question does not indicate the nature of the evidence sought to be elicited or that the witness has any knowledge on the subject, and there is no offer of proof or statement of what is expected to be shown by the answer, the error, if any, in excluding the question cannot be said to be prejudicial. *Trzebietowski v. Jereski*, 190

Determination and disposition of cause: Mandate on reversal. See CONTRACTS, 4. DAMAGES, 4, 5.

Same: Affirmative relief to respondent: Directing judgment. See APPEAL, 4.

10. Any rules of practice heretofore existing which prevent a judgment finally terminating litigation in a case where the record is properly before the supreme court and it is apparent that further proceedings could only result in unnecessary expense, are abrogated; and conflicting cases are overruled. *Pietsch v. McCarthy*, 251

Appeal from Milwaukee civil court. See AUTOMOBILES, 2.

Appeal from board of review. See TAXATION, 14.

ARGUMENT TO JURY. See TRIAL, 1.

ASSAULT with intent, etc. See RAPE, 4–6.

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ASSAULT AND BATTERY.

1. In a civil action for an assault the uncorroborated testimony of the plaintiff may be sufficient to sustain a verdict in her favor. *Peterson v. Lemke,* 353

2. In a civil action for an assault, where it was essential for plaintiff to prove that defendant had been guilty of a criminal act, it was error to charge that it was incumbent upon plaintiff to prove her case by a fair preponderance of the evidence only, instead of by a clear and satisfactory preponderance of the evidence; but no exception having been taken to such charge, and the real controversy having been fully tried, and it not appearing to be probable that justice has miscarried, this court declines, even under sec. 2405*m*, Stats., to reverse a judgment in plaintiff's favor. *Ibid.*

ASSESSMENTS. See INSURANCE, 1, 3, 4, 8, 9.

ASSESSORS. See TAXATION, 14.

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ATTORNEYS AT LAW. See LIBEL AND SLANDER, 3. TRIAL, 1. WILLS, 6.

ATTRACTIVE NUISANCES. See NEGLIGENCE, 2, 3.

AUTOMOBILES.

1. In an action for the injury to an automobile which, in the evening, ran into the rear of a wagon on a city street, plaintiff's own testimony that he was running his car at a speed of from ten to thirteen miles per hour, that his vision was so dazzled by the headlights of automobiles coming in the opposite direction that he could not see the wagon ahead of him, and that in this situation he proceeded a distance of 100 feet without slacking his speed until he bumped into the wagon, is *held* to show his contributory negligence as a matter of law. Sec. 1636—52, Stats. 1913. *Pietsch v. McCarthy,* 251

2. Upon such evidence the circuit court, on reversing a judgment of the Milwaukee civil court in plaintiff's favor, should have dismissed the complaint instead of ordering a new trial. *Ibid.*

BENEFITS. See MUNICIPAL CORPORATIONS, 1.

BILL OF LADING. See CARRIERS, 1, 2, 9–11, 15.

BILLS AND NOTES.

Consideration: Shortage in accounts: Duress.

1. Defendant, who had been employed by plaintiff as a salesman or manager, assisted plaintiff's auditor in making up a statement of goods on hand and business done, which showed a shortage for which he was indebted to plaintiff. He signed, of his own free will, a certificate that such statement was correct, and afterwards gave his note for the amount of the shortage. In an action on such note it is *held* that it was not sufficient to defeat a recovery for defendant to testify that he did not owe plaintiff anything, that the statement must have been wrong because he knew he kept his accounts correctly, and to give an explanation

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as to how the shortage might have occurred, where he could point out no inaccuracy in the statement and did not know that the shortage in fact occurred in the way suggested. *Jewel Tea Co. v. Weber*, 543

2. The entire controversy having been tried in such action on the note, and it appearing that the amount for which it was given was in fact due, it is immaterial whether or not the note was given under duress. *Ibid.*

Same: Sureties: Discharge by surrender of security: Corporate stock: Conversion.

3. Where a surety gives his note to take up one on which he is liable as a surety, with full knowledge that the property of his principal held by the payee of such note to secure payment thereof has been released and the right thereto relinquished, the surety's obligation continues and the note so given by him becomes a valid obligation; and such recognition of his liability does not require a new consideration. *German Nat. Bank v. Barber*, 109

4. Although a bank, which for the protection of itself and indorsers of the note held certificates of its own stock as security for payment of a note given by a subscriber for the amount unpaid on such stock, delivered the certificates to said subscriber without requiring payment of the note and without the knowledge or consent of the indorsers, and thereafter the stock was transferred to one of the officers of the bank, such facts did not show a fraudulent conversion of the stock which would entitle the indorsers to recover the value thereof from the bank, where the bank did not receive the proceeds of the transfer. *Ibid.*

BOARD OF REVIEW. See TAXATION, 14.

BONDS. See GUARANTY, 9, 10.

BRIEFS. See APPEAL, 5.

BROKERS.

Knowledge of agent, when imputed to principal.

1. One who employed an agent to find a purchaser for his land was not chargeable with knowledge which the agent had previously acquired (but did not communicate to his employer) as to other lands which the employer finally agreed to accept in part payment, since such knowledge of the agent did not relate to the subject of his employment, was not acquired while he was acting as agent, and was not within the scope of his authority. *Govier v. Brechler*, 157

2. A contract for the sale of land having provided that the vendor was to accept other land in part payment, but that if such other land was not as represented he might reject it and demand cash in lieu thereof, knowledge of the vendor's agent that such other land was not as represented was immaterial and did not affect the vendor's right to reject it. *Ibid.*

BURDEN OF PROOF. See ASSAULT AND BATTERY, 2. CARRIERS, 15. HUSBAND AND WIFE, 2.

BY-LAWS. See INSURANCE, 5–7.

CANVASS OF VOTES. See ELECTIONS.

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CARRIERS.

Contracts: What law governs: Limiting liability: Through contracts: Refusal of connecting carrier to receive freight: Delivery: Embargo, when lawful.

1. In the absence of evidence showing a contrary intent, a bill of lading issued in Illinois is governed by the law of that state as to the nature and validity of the contract, and this includes the question whether a printed clause in such bill of lading limiting the carrier's liability to its own line is binding upon the consignor. *Berger-Crittenden Co. v. C., M. & St. P. R. Co.* 256
2. Under the law of Illinois as interpreted by its courts, such a limitation is not prohibited, but to make it effective something more is required than merely delivering the freight and accepting a bill of lading with the limitation printed therein; and the same ruling will be applied here in respect to a bill of lading issued in that state. *Ibid.*
3. In Illinois, as in this state, the English rule prevails, that the acceptance of freight consigned to a point beyond the line of the first carrier, and delivery of the usual receipt specifying the point of origin of the freight, the terminal point, the connecting line required to complete the transit, and the rate for the entire carriage, constitutes a contract for through service, rendering the initial carrier liable for default of the connecting carrier. *Ibid.*
4. Where a railroad company, designated as connecting carrier in a contract of affreightment for a through rate, accepts the freight and demands and receives part of the through rate, and then fails to complete its part of the transit, or where it has held itself out to the public for the performance of such service, or by general course of business has authorized the initial carrier to make the through contract, and then refuses to receive the freight from the initial carrier upon some ground inconsistent with its contractual obligations to do so, the wrong constitutes a breach of contract, and both carriers may properly be joined in an action to recover damages therefor. *Ibid.*
5. The question whether a particular situation constitutes reasonable cause for a railroad company to refuse to receive freight of a particular kind, or from or for a particular point, may be and generally is one of law; but whether such particular situation exists or not in any given case is generally a question of fact to be decided upon evidence. *Ibid.*
6. Mere delivery by a carrier of a carload of freight at the unloading place does not constitute delivery of the subject of transit into the possession of the consignee; the latter being entitled to reasonable time and opportunity to inspect the property and to reject it if rendered worthless or materially injured in transit. Hence, where the consignee had justifiably refused to accept property which became worthless while in transit, the fact that the cars containing such property filled its delivery track did not render it responsible for the blockade so as to warrant the carrier in refusing to accept and deliver other freight shipped to said consignee. *Ibid.*
7. After notice of an embargo by a connecting carrier, the initial carrier may accept freight at its own risk of the embargo being actually lifted by the former, or being constructively lifted because of the reasonable basis for it no longer existing, in time for the through transit to be completed. *Ibid.*

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8. A railroad company must have reasonable ground for instituting an embargo of freight from another carrier, or it is illegal, and if legal when instituted, its continuance becomes illegal when there is no basis for it other than its own culpable negligence. *Ibid.*

Same: Liability of initial carrier: Bill of lading: Shipment to foreign country: Deviation from contract.

9. Under a bill of lading, issued upon a shipment of goods from Superior to Winnipeg, stating that the carrier issuing it agrees to transport only over its own line and, except as otherwise provided by law, acts only as agent with respect to the portion of the route beyond its line, and that no carrier shall be liable for loss or damage not occurring on its portion of the route, except as such liability is or may be imposed by law, "but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed," the liability of the initial carrier was confined to its own line, unless a greater liability was imposed by law. *Best v. Great Northern R. Co.* 429

10. The Carmack amendment to the Interstate Commerce Act (34 U. S. Stats. at Large, 595, ch. 3591) applies only to shipments from one state to another, and not to a shipment from one state to a foreign country. *Ibid.*

11. Where the contract of shipment was closed, bill of lading issued, and goods placed in the car, and defendant had held the car for forty days to accommodate the shipper and then, needing the car, wired for instructions and was advised that the shipper would return in a few days and would then send the car on to destination, it was not liable for negligence of a connecting carrier, as for deviation from contract, merely because it forwarded the car without awaiting the shipper's return. *Ibid.*

12. Evidence that goods were properly carried by the initial carrier, without negligence or breach of duty, to the end of its line, and there delivered to the connecting carrier, in connection with the presumption against the last carrier, is *held* sufficient to support a finding of the jury that the goods were damaged after delivery to the latter. *Ibid.*

13. Evidence that when the car in which plaintiff's goods were shipped arrived at destination, it being under seal while *en route*, there were found in it goods not shipped by plaintiff, would not justify an inference that the goods had been unloaded from the car after being placed therein and then injured in reloading. *Ibid.*

14. In an action against a common carrier to recover for damage to household goods in transit, it being claimed by the defendant that the injury resulted from the goods not being crated, evidence was admissible as to the effect on such goods of being shipped a long distance without crating. *Ibid.*

15. A recital in a bill of lading that the goods were "received in apparent good order," relates to the condition of the goods, not to the manner of loading, and does not relieve the shipper of the burden of proof as to proper loading. *Ibid.*

16. An instruction to the effect that a railway company is not liable for damage to furniture caused by the ordinary jerks and jars of train movements, "or in stopping or starting of the trains," was not erroneous as giving the jury to understand that negligent stopping or starting of trains was referred to. *Ibid.*

17. An instruction to the effect that in the absence of direct evidence that injury to goods in transit was caused by defendant, the

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initial carrier, the jury might presume that it was caused by the last carrier, was correct. *Ibid.*

Demurrage charges: When sidetrack is full: Placing cars: Embargo: Illegality: Removal without notice.

18. Within the meaning of a rule relating to car service and demurrage charges, a private sidetrack was "full" when, although it would hold more, as many cars were upon it as could be handled and unloaded thereon. *C. & N. W. R. Co. v. Menasha P. Co.* 508

19. An embargo by which a railway company, at the request of a manufacturer and not by reason of any conditions on its lines necessitating it, refused to furnish cars for shipments to such manufacturer, was illegal under the statutes which provide against discrimination or special privilege; and, in the absence of any agreement that notice should be given of its removal, no duty rested upon the railway company to notify the manufacturer before raising such embargo. *Ibid.*

20. Under rules providing for demurrage charges on cars for unloading after expiration of a certain "free time" following the notice of arrival or placing; that such cars shall be considered placed when they are held awaiting orders from consignees; and that the delivery of cars to a private track shall be considered to have been made when such cars have been placed on the track designated or, if such track be full, when the delivery would have been made had the condition of such track permitted, demurrage charges were proper upon cars which, after notice to the consignee of their arrival, were held beyond the free time, awaiting orders, because of congestion on the private sidetrack of the consignee, although after reaching their destination such cars had been carried to the nearest siding and there held until an accumulation in the yards ceased, it appearing that the consignee's private track was kept full and that there was no delay in switching the cars upon such track when the consignee so requested. *Ibid.*

Injury to horses: Negligence.

21. In an action for injury to horses alleged to have been caused by defendant's negligent delay in spotting the car in which they had been carried so that they could be unloaded, it appearing that after the car arrived at its destination plaintiff's employees in charge thereof, knowing that the horses were sweating and that the car could not be spotted for several hours, went away leaving the side doors of the car partly open, and that when they returned the horses were cold and shivering, it is *held* that, even assuming that defendant was negligent in delaying to spot the car, the jury was not warranted in finding that such negligence was the proximate cause of the injury. *Boland v. Chicago & N. W. R. Co.* 609

22. The evidence in such case is *held* insufficient, also, to warrant a finding that the death of one horse and the foundered condition of another was caused by exposure in the car. *Ibid.*

CERTIORARI.

The circuit court may properly issue its writ of *certiorari* to the judge of that court to review his *quasi*-judicial action in removing a town officer, and the judgment of the circuit court thereon may be reviewed in the supreme court on appeal. *State ex rel. Ballard v. Goodland,* 393

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CIRCUIT COURTS. See AUTOMOBILES, 2. CERTIORARI. CONSTITUTIONAL LAW, 10.

CIRCUIT JUDGE. See CERTIORARI. CONSTITUTIONAL LAW, 14. JUDGES. OFFICERS, 3, 4.

CIVIL COURT OF MILWAUKEE COUNTY. See AUTOMOBILES, 2. CONSTITUTIONAL LAW, 20–22. REPLEVIN.

CLAIMS. See MUNICIPAL CORPORATIONS, 6–8.

COLLISION. See AUTOMOBILES, 1. NEGLIGENCE, 13.

COMITY. See CARRIERS, 1–3.

COMMERCE.

See CARRIERS, 1–3, 10. CORPORATIONS, 10. RAILROADS, 15–21.

Since the enactment of the Carmack amendment (34 U. S. Stats. at Large, 595, ch. 3591), as well as before, an action for damage to goods in an interstate shipment may be maintained against a carrier who negligently caused such damage but who was not the initial carrier; and the state courts have jurisdiction of such actions. *Bichlmeir v. M., St. P. & S. S. M. R. Co.* 404

COMPLAINT. See ESTOPPEL, 3, 4. PLEADING, 1. QUO WARRANTO.

COMPROMISE AND SETTLEMENT.

1. Compromise settlements are favored in the law when fairly made. *Rayborn v. Galena Iron Works Co.* 164
2. The signing of an instrument raises a strong presumption that its contents are understood, which is not overcome by a mere statement of the signer that he did not understand the nature of the document which he signed. *Ibid.*
3. The jury having in this case, upon sufficient evidence, negatived fraud in the transaction which resulted in the signing of a release by an employee twelve days after he was injured and while he was still in the hospital, the evidence, including his own testimony and that of his physician who was present, is *held* not to sustain a further finding by the jury to the effect that the release was not consciously signed by him. *Ibid.*

CONCURRENT NEGLIGENCE. See NEGLIGENCE, 6.

CONDEMNATION OF LAND. See MUNICIPAL CORPORATIONS, 1. RAILROADS, 6.

CONDITIONS. See LANDLORD AND TENANT, 1.

CONSIDERATION. See BILLS AND NOTES, 1–3. CONTRACTS, 1. GUARANTY, 1. HUSBAND AND WIFE, 6, 7, 12, 13.

CONSPIRACY.

Findings with reference to an alleged conspiracy between officers and directors of a corporation to discriminate against plaintiff in respect to authority, work, and salaries in the company are criticised as vague, unsatisfactory, and unsupported by any definite evidence. *Casper v. Kalt-Zimmers Mfg. Co.* 517

CONSTITUTIONAL LAW.

Construction and operation of constitutional provisions. See CONSTITUTIONAL LAW, 8. ELECTIONS, 1. OFFICERS, 1, 3, 4, 7.

1. The provision of sec. 9, art. I, Const., that every person is entitled to a certain remedy in the law for all injuries, etc., is above and

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superior to any inconsistent common-law rule that existed when the constitution was framed, as well as any statute enacted since that time. *State ex rel. Wickham v. Nygaard,* 396

2. *Jefferson Co. v. Milwaukee Co.* 20 Wis. 139, doubted. *Ibid.*

Same: School funds: Proceeds of fines.

3. That part of ch. 525, Laws of 1909 (sec. 4567*m*, Stats.), which provides that one third of the fines collected for violations of the fish and game laws shall be paid to the county treasurer and set apart as a fund for the protection of fish and game, is void because in conflict with sec. 2, art. X, Const., which provides that "the clear proceeds of all fines collected in the several counties for any breach of the penal laws" shall go to the school fund. *State ex rel. Johnson v. Maurer,* 653

Legislative powers. See ELECTIONS, 9.

Judicial powers and functions: Construction of statutes: Validity.

4. It is the duty of the court to firmly maintain its own function, but not trespass upon that of the legislature. The former requires solution of doubts respecting legislative purpose intended to be embodied in an enactment and the pronounced result becomes, in effect, written into such enactment. *State ex rel. Husting v. Board of State Canvassers,* 216

5. If by judicial construction a legislative enactment embodies a purpose which is unconstitutional it must be condemned. *Ibid.*

6. If part of an enactment is unconstitutional and the remainder is not, and is reasonably complete by itself, and the former was not such inducement to the entirety but what the latter might, within reasonable probability, have been enacted by itself, to that extent it should be approved and otherwise disapproved. *Ibid.*

7. If a legislative enactment is so uncertain that the court cannot determine with any reasonable degree of certainty, what its purpose was, or if it be so incomplete that it cannot be executed, it must be condemned as void. *Ibid.*

8. In construing an ambiguous legislative enactment some established rules are to be observed as unwritten law with all the force of written law, and among them:

(a) No attempt to read a legislative enactment different from its plain words and evident meaning on its face is legitimate, if so read it "leads to no absurd consequences."

(b) There should be real uncertainty of meaning found in a legislative enactment before resorting to reading it by aid of rules for judicial construction.

(c) Whether the meaning of words of an enactment are plain is to be determined with reference to the connections in which they are used, the subject dealt with, the circumstances at the time, and the object in view.

(d) The term "and leads to no absurd consequences" requires the rule that ambiguity requiring judicial construction may as well arise from applying the literal sense of words to the subject dealt with as from uncertainty of the words themselves.

(e) An intent, however apparent, which cannot reasonably be read out of a legislative enactment, should not be adopted, but an intent, however absurd, which can be so read and shows clearly the legislative purpose beyond reasonable doubt, must be adopted regardless of the effect upon validity.

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(f) The very letter of an enactment may be violated to carry out a manifest legislative intent, so long as it can be found expressed within the reasonable scope of the language used.

(g) Where there is irreconcilable conflict between a legislative enactment and an earlier law, a presumption arises of a purpose to modify or repeal the latter; but that is rebuttable by circumstances and, among them, that the existing law constitutes an entire system and the later enactment would render the entirety unconstitutional or absurd. *Ibid.*

9. No effect can be given to a legislative enactment, however broad its provisions, further than to harmonize it with existing law which is necessary to a constitutional requirement, and if a law be held to have been intended otherwise the court must declare it void for uncertainty or unconstitutionality. *Ibid.*

Same: Jurisdiction of circuit courts.

10. Under sec. 8, art. VII, Const., all tribunals acting in a *quasi*-judicial capacity are subject to the jurisdiction of the circuit court. *State ex rel. Ballard v. Goodland,* 393

Taxation: Income tax: Salaries of public officers: Circuit judge.

11. The amendment to sec. 1, art. VIII, Const., providing that "taxes may be imposed on incomes," authorized the legislature to tax incomes in any case where the power rests in the state to impose such a tax, and hence includes power to tax the salaries of public officers. *State ex rel. Wickham v. Nygaard,* . 396

12. The provision of sec. 1087*m*—2, Stats. 1913, exempting salaries "where the taxation thereof would be repugnant to the constitution," did not show an intention on the part of the legislature to exempt salaries of public officers, provided they were constitutionally taxable. *Ibid.*

13. *It seems* that the salaries of federal office holders residing in this state are not subject to taxation by the state. *Ibid.*

14. A circuit judge is a state officer; and as such his salary is subject to taxation under the state income tax law. The imposition of such tax after his term of office has commenced does not violate sec. 26, art. IV, Const., providing that the compensation of any public officer shall not be increased or diminished during his term of office, because that section must be read in connection with the amendment to sec. 1, art. VIII. *Ibid.*

Same: Uniformity in rule of taxation: Railroads. See TAXATION, 16.

15. The constitutional command that the rule of taxation shall be uniform (Const. art. VIII, sec. 1) is violated if a part of the property of a railway company, reasonably necessary to be used and in fact used in the operation of the railroad, be separated from the balance of the property and subjected to local taxation at a higher rate than that to which the balance of the property is subjected under the *ad valorem* law. *Minneapolis, St. P. & S. S. M. R. Co. v. Douglas County,* 408

Same: Cost of reassessment. See TAXATION, 15, 16.

Personal civil and political rights: Eligibility to office. See OFFICERS, 6.

Same: Freedom of speech.

16. Sub. 2, sec. 4569, Stats., making it a misdemeanor for one person to slander another, is not an abridgment of freedom of speech as guaranteed by sec. 3, art. I, Const. *Hyde v. State,* 651

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17. In a prosecution under sub. 2, sec. 4569, Stats., it is not necessary to prove that the reputation of the slandered person was in fact injured or impaired, it being sufficient that the slanderous words "expose him to hatred, contempt, or ridicule." *Ibid.*

18. It is sufficient for a conviction in such a case that a substantial portion of the words charged in the information be proved to have been spoken substantially as charged, although there may be slight differences in the form of expression. *Ibid.*

Obligation of contracts. See RAILROADS, 4.

Trial by jury: Equal protection of the laws. See COURTS.

19. The jury trial guaranteed by sec. 5, art. I, Const., is the jury trial which existed in the territory at the time of the adoption of the constitution. *Reliance Auto Repair Co. v. Nugent,* 488

20. The jury trial provided for in the civil court of Milwaukee county (under ch. 549, Laws of 1909) satisfies the constitutional guaranty; and, as the guaranty contemplates but one jury trial, the provisions of law authorizing the affirmance of judgments of that court without new trial do not transgress the constitution. *Ibid.*

21. The requirement that the party demanding a jury shall pay into court a jury fee of $12, to be recovered by him in the cost bill if successful in the action, is not an unreasonable regulation of the right, nor is it an invasion of sec. 9, art. I, Const., which provides that "every person . . . ought to obtain justice freely, and without being obliged to purchase it." *Ibid.*

[22. Whether ch. 261, Laws of 1913,—providing that on any appeal from the civil court to the circuit court of Milwaukee county, where the defendant resides in another county he may have the place of trial changed to the circuit court of his own county and shall be entitled to a new trial in the same cases as in case of appeal from justice's court,—denies to defendants residing in Milwaukee county the equal protection of the laws, is not decided.] *Ibid.*

Due process of law. See OFFICERS, 2.

CONSTRUCTIVE NOTICE. See SALES, 1.

CONTEMPT. See LIBEL AND SLANDER, 6.

CONTRACTS.

Requisites and validity in general. See BILLS AND NOTES. CARRIERS, 1–3. CORPORATIONS, 10. HUSBAND AND WIFE. SALES. SUNDAY. TOWNS, 11–16.

Same: Contracts for benefit of third persons.

1. A contract providing that the owner of certain property should convey it to defendant free of all liens or claims except two mortgages, and that as part of the consideration defendant should assume and pay plaintiff's claim against said owner, was, together with the proper deeds, placed in escrow, not to be delivered until the owner was able to comply with the conditions of the contract. Being unable to comply therewith, the owner afterwards in terms released defendant from paying plaintiff's claim. *Held,* that as the contract never became operative defendant never became liable to pay plaintiff's claim. *Tweeddale v. Tweeddale,* 116 Wis. 517, and *Wetutzke v. Wetutzke,* 158 Wis. 305, distinguished. *Gimbel Brothers v. McConnell,* 325

Same: Consideration. See BILLS AND NOTES, 1–3. CONTRACTS, 1. GUARANTY, 1. HUSBAND AND WIFE, 6, 7, 12, 13.

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Same: Mutuality. See SPECIFIC PERFORMANCE, 5–7.

Construction and operation. See INSURANCE. LANDLORD AND TENANT. PARTNERSHIP. SALES. SPECIFIC PERFORMANCE. VENDOR AND PURCHASER.

2. A contract providing for the purchase of corporate stock, to be paid for within eight years, that it should be held in escrow until paid for, that the dividends should be paid to the purchaser but should be used to pay interest on the purchase money, and that in case of default in making any payment of principal or interest the agreement should become void, the deposit be terminated, and the stock returned to the vendor, is construed as giving the vendor an option to declare the contract void in case of default, or to enforce it and collect the purchase price, as she might choose. *McMillen v. Strange,* 271

3. A privilege reserved in such a contract to pay the entire purchase price before the expiration of the time limited therefor, is not an unusual provision, nor can it be said to be unfair or unconscionable toward the vendor. *Ibid.*

4. In an action to recover the contract price of sugar beets grown for defendant and compensation for pitting them, it appeared that plaintiff agreed to cover the beets when pitted. The trial court found that he did cover them, but there was no evidence to support such finding. It not appearing clearly from the evidence whether the subsequent spoiling of the beets was caused by failure to cover them, upon reversal of the judgment for plaintiff the cause is remanded for determination of the questions whether he in fact fulfilled his contract by covering the beets, and, if he did not, whether the spoiling was caused by his failure to do so. *Romey v. Rock County Sugar Co.* 552

Performance or breach. See CARRIERS, 4. DAMAGES, 2, 3. LANDLORD AND TENANT, 7. SALES, 5. SPECIFIC PERFORMANCE.

5. A finding by the circuit court that a petitioner, who claimed to be entitled to payment for services performed by him under contract as general manager of a railroad company prior to the appointment of a receiver, had breached his contract and had not performed the services required of him, is *held* to be sustained by the evidence. *First Sav. & T. Co. v. C. & S. C. R. Co.* 344

CONTRIBUTORY NEGLIGENCE. See AUTOMOBILES, 1. MASTER AND SERVANT, 1, 2, 5–7. RAILROADS, 10–13. STREET RAILWAYS, 1–3.

CONVERSION. See BILLS AND NOTES, 4.

CORPORATIONS.

Articles of incorporation: Restricting transfer of stock.

1. A provision in articles of incorporation that if any of the original stockholders wish to sell their stock they shall first offer it to the board of directors and give that board ten days in which to place it with the stockholders, is valid. *Casper v. Kalt-Zimmers Mfg. Co.* 517

Same: Amendment: Reformation: Waiver.

2. Whether a corporation be organized under a general law or by special act its charter is a legislative act and cannot be reformed or amended by the courts. *Ibid.*

3. Articles of incorporation must be construed like other legislative enactments, and the testimony of the framers as to what was intended by the language used is not competent. *Ibid.*

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4. If a mistake was made in articles of incorporation, so that they do not express the intent of the incorporators or stockholders, the statutory method of changing or amending such articles is exclusive. *Ibid.*

5. Waiver of a charter provision may validate an act as to which it was waived; but no waiver can be effectual to annul such a provision or render it inoperative in the future. *Ibid.*

Capital stock. See CONTRACTS, 2. CORPORATIONS, 1. FRAUD, 7, 8. TAXATION, 1.

Dividends. See TAXATION, 6–11.

6. Where a stockholder claims that stock dividends had been declared but never received by her, and it appears that the corporation transferred the stock in question to other persons more than six years prior to the commencement of her action, her right to recover is barred. If such transfer was tortious she might, as soon as the wrong was committed, have brought an action for conversion or an action to compel reconveyance of the stock to her; and in such a case when the statute of limitations has run upon and bars the legal remedy it bars also the equitable remedy. *Casper v. Kalt-Zimmers Mfg. Co.* 517

Stockholders: Who are: Directors.

7. One who holds the mere legal title to stock in a corporation is a stockholder within the meaning of sec. 1776, Stats., and may be chosen a director. *Casper v. Kalt-Zimmers Mfg. Co.* 517

Meetings: Notice: Waiver. See RELIGIOUS SOCIETIES.

8. Statutory and other requirements for notice of meetings of the members of a corporation are for the benefit of such members and may be waived by their presence and acquiescence. *Lutheran T. Cong. v. St. Paul's Eng. E. L. Cong.* 56

Officers and agents: Good faith: Secret profits. See CONSPIRACY.

9. Where an officer of a corporation is alleged to have made a secret profit in a purchase of land for it, and other property or equities in property were in part traded for such land or figured in the transaction, positive testimony of such officer that he paid $35,000 for the land—which was the price paid to him by the corporation—cannot be held to be contradicted by the mere fact that nine years after the purchase he was unable to state just how $1,247.83 of the amount was paid. *Casper v. Kalt-Zimmers Mfg. Co.* 517

Foreign corporations.

10. A contract made in this state with a foreign corporation to pay for a course of instruction in a correspondence school located in another state, is one pertaining to interstate commerce, and may be enforced although the foreign corporation is not licensed, under sec. 1770*b*, Stats., to do business in this state. *International Textbook Co. v. Mabbott,* 423

COSTS.

The awarding of costs in a taxpayers' action to restrain the payment of illegal town orders, is a matter resting in the sound discretion of the trial court. Under the evidence in this case, which disclosed many irregularities and great looseness in the administration of town affairs, there was no abuse of discretion

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in awarding costs against the town officers and other defendants, but not against the town. *Menasha W. W. Co. v. Winter*, 437

COUNTERCLAIM. See PLEADING, 2. SALES, 4.

COUNTIES.

Officers: Powers and duties: Purchase of lands: Refusal of clerk to issue county orders: Conditions precedent: Approval of abstract by district attorney.

1. The powers of county officers derived from the legislature cannot be enlarged, narrowed, or taken away by action of the county board, except as the legislature has authorized such enlargement or limitation. *Reichert v. Milwaukee County*, 25
2. Thus, although the county board is given power to contract and to authorize and require the making and delivery of county orders, and the duty of the county clerk in signing and delivering such orders is ministerial, the clerk may refuse to sign and deliver an order not legally authorized. *Ibid.*
3. Every ministerial officer in the performance of purely ministerial acts is required, at his peril, to interpret the statute, or the order made in pursuance thereof, imposing a duty upon him and calling for action on his part. His decision if erroneous does not exempt him from liability in an action, but if correct is sufficient to defeat an action against him. *Ibid.*
4. A resolution of a county board accepting an offer to sell land directed delivery of a county order for the purchase price upon approval by the district attorney of an abstract of title and tender of an approved conveyance. Consummation of the purchase having been temporarily enjoined in a taxpayer's action, when the vendors tendered an approved abstract and conveyance the county clerk refused to issue the order. About five months later, after discontinuance of the injunction suit, the county board again directed issuance of a county order as provided in the previous resolution. The vendors again prepared a conveyance and an abstract brought down to date, but with only the former approval of the district attorney. The clerk, who knew that another taxpayer's action was to be commenced, again refused to issue the order. The second taxpayer's action was begun on that day and notice of *lis pendens* filed. On the next day the district attorney, having found such notice on file, refused to approve the abstract. *Held*, that the second refusal of the clerk to issue the order was proper because (1) knowing of the action to be brought, he had a right to take a reasonable time to investigate and obtain advice in the matter, and (2) the previous approval of the abstract, given five months before, was not sufficient under the resolution of the county board. *Ibid.*
5. Pendency of the second taxpayer's suit was a sufficient ground for the refusal of the district attorney to approve the abstract. *Ibid.*
6. The vendors, having failed to procure and present a proper approval of the abstract by the district attorney as required by the resolution of the county board, were not entitled to a county order at that time and the county was therefore not then in default nor was it liable to pay interest as damages when, after dismissal of the second taxpayer's action, the purchase was consummated and county orders issued for the purchase price. *Ibid.*

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7. Although as to one of the tracts to be purchased the resolution of the county board (passed in June, 1907) directed that upon approval of the abstract, etc., a county order be delivered for a part of the purchase price and that the balance be paid "on or before March 1, 1908, with interest at four per cent.," payment of such balance as well as delivery of the county order was conditioned upon approval of the abstract, and such approval not having been obtained prior to the taxpayer's action the county was not liable for interest. *Ibid.*

Contracts: Liability for interest. See COUNTIES, 7.

8. With reference to liability to pay interest as damages, a county is not upon the same footing as an individual or a private corporation. *Reichert v. Milwaukee County,* 25

COUNTY ASSESSOR. See TAXATION, 14.

COUNTY BOARD. See COUNTIES, 1–7.

COUNTY ORDERS. See COUNTIES, 2, 4–7.

COUPONS. See INTEREST.

COURTS.

Jurisdiction: Equitable remedies: Denial.

1. For violation of a remediable right the person injured has an absolute constitutional right to a remedy conformably to the laws; and a court may not deprive him of such right by denying an equitable remedy where that is the only one available or where such denial is practically a denial of justice. *Lutheran T. Cong. v. St. Paul's Eng. E. L. Cong.* 56

2. A court may not supersede the legal and equitable rights of parties by judicial notions of what is best for them from a moral standpoint. *Ibid.*

Supreme court. See APPEAL.

Circuit courts. See CERTIORARI. CONSTITUTIONAL LAW, 10.

Milwaukee civil court. See AUTOMOBILES, 2. CONSTITUTIONAL LAW, 20–22. REPLEVIN.

Judges: Disqualification. See JUDGES.

Same: Salaries: Income tax. See CONSTITUTIONAL LAW, 4.

COVENANTS. See LANDLORD AND TENANT, 1, 3, 7.

CRIMINAL LAW AND PRACTICE. See CONSTITUTIONAL LAW, 16–18. HOMICIDE. RAPE.

DAMAGES.

Grounds and subjects of compensatory damages. See COUNTIES, 6–8. LANDLORD AND TENANT, 2, 5. LIBEL AND SLANDER, 2. MUNICIPAL CORPORATIONS, 7. RAILROADS, 8, 9.

Same: Mitigation. See LIBEL AND SLANDER, 10, 11.

Liquidated damages. See SALES, 3.

Exemplary damages. See LIBEL AND SLANDER, 5, 8.

Measure of damages. See MUNICIPAL CORPORATIONS, 6–8. LANDLORD AND TENANT, 2. LIBEL AND SLANDER, 4. MUNICIPAL CORPORATIONS, 8.

1. In replevin the measure of defendant's damages for the taking and detention of the chattel seized on the writ is the reasonable value of its use for the time it is detained, not interest on its value. *Pfeifer v. Layton Park Oil & Soap Co.* 1

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2. By contract defendant gave plaintiff the right to sell, on commission, beet pulp from its factory at a certain price, reserving the privilege of supplying its Western market, but directing plaintiff to go ahead and sell all the pulp he could and mail orders direct to the factory, the same to be filled as soon as the factory started up, and to confirm orders until instructed to the contrary. Plaintiff accordingly secured and confirmed orders for pulp until notified to desist, but defendant was unable to fill a part of such orders. *Held*, that plaintiff was entitled to recover, as damages for such failure, his commissions on pulp not delivered and the amount he was obliged to pay his customers to secure cancellation of their orders. *Baringer v. Rock County Sugar Co.* 555

Same: Computation: Changing jury's findings.

3. Where, upon the other facts found by the jury in an action for breach of a contract to deliver lumber, the total amount of damages was simply a matter of mathematical computation, it was proper for the trial court to make such computation and to modify, in accordance therewith, the gross sum found by the jury. *Webster Mfg. Co. v. Montreal River L. Co.* 456

Excessive damages: Option to take smaller sum. See MUNICIPAL CORPORATIONS, 8.

4. An award of $4,625 for death of a workingman fifty-nine years old and capable of earning about $400 per year being deemed clearly excessive, although the question was not raised by defendant, this court, under sec. 2405*m*, Stats., remands the cause for a new trial unless plaintiff elects to take judgment for $3,000. *Gillett v. Flanner-Steger L. & L. Co.* 578

5. An award of $10,000 for injuries to a brakeman's foot, necessitating amputation of the leg between the ankle and the knee, is *held* not so large that this court should reverse the judgment, under sec. 2405*m*, Stats. 1913, on the ground that justice had miscarried, where, although the proper motion was made in the trial court, the question was not argued upon the appeal. *Graber v. Duluth, S. S. & A. R. Co.* 414

DEATH. See EJECTMENT, 2. HOMICIDE. INSURANCE, 5–12. MASTER AND SERVANT, 3. MUNICIPAL CORPORATIONS, 4, 5. NEGLIGENCE, 3. RAILROADS, 10.

DEFAULTER. See OFFICERS, 5, 6.

DELIVERY. See CARRIERS, 6. CONTRACTS, 1. INSTRUCTIONS TO JURY, 9, 10.

DEMURRAGE. See CARRIERS, 18–20.

DEMURRER. See PLEADING, 1. QUO WARRANTO.

DIRECTING VERDICT. See RAILROADS, 10.

DIRECTORS. See CORPORATIONS, 7.

DIRECTORY STATUTES. See ELECTIONS, 11.

DISCRETION. See COSTS. ELECTIONS, 11.

DISMISSAL AND NONSUIT. See APPEAL, 4. RAILROADS, 9.

DISQUALIFICATION. See JUDGES.

DIVIDENDS. See CORPORATIONS, 6. TAXATION, 6–11.

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DIVORCE.

Service by publication. See PROCESS.

Grounds.

1. In an action for divorce on the ground of cruel and inhuman treatment, wherein defendant counterclaimed on the same ground, a finding by the trial court that neither party was entitled to a divorce on that ground is sustained. *Kopplin v. Kopplin,* 559

Interlocutory judgment: Remarriage before final judgment: Validity.

2. An interlocutory judgment of divorce entered pursuant to ch. 323, Laws of 1909 (sec. 2360*k*), upon which final judgment could not be entered before the expiration of one year from its date, was not so affected by the subsequent enactment of ch. 239, Laws of 1911, that it thereby became a final decree; it being plainly the legislative intent that interlocutory judgments entered pursuant to the statute of 1909 must proceed to completion by final judgment under that statute. [Whether the legislature could make final a decree which was theretofore interlocutory only, is not decided.] *Dallmann v. Dallmann,* 480
3. Nor was the restriction on remarriage contained in the act of 1909 (whereby it was made unlawful for any party to the action to marry again until the final judgment was entered) repealed or abrogated by the act of 1911, which forbade such remarriage until the end of one year from the final judgment. *Ibid.*
4. When, therefore, a party to an action in which the interlocutory judgment of divorce was entered before the enactment of the statute of 1911, married again before entry of the final judgment, such marriage was unlawful and might be annulled under sub. (3), sec. 2351, Stats. *Ibid.*

DOCKS. See TAXATION, 4, 5.

DOWER.

See HUSBAND AND WIFE, 2, 6, 7.

1. Under sec. 2160, Stats., providing that "any woman residing out of this state shall be entitled to dower only of lands of her husband, being in this state, of which he died seised," the words "residing out of this state" refer, not to the time of the husband's death, but to the time of the conveyance of the land by him without her signature. *Bennett v. Harms,* 51 Wis. 251, overruled. *Ekegren v. Marcotte,* 539
2. Even though the husband is a resident of Wisconsin the wife may be "residing out of this state," under said statute. *Ibid.*

DUE PROCESS OF LAW. See OFFICERS, 2.

DURESS. See BILLS AND NOTES, 2.

EJECTMENT.

Who may maintain.

1. One in peaceable possession of land under a claim of ownership, even if in fact he has no title, may maintain ejectment against a mere trespasser who intrudes upon such possession. *Klooz v. Hood,* 301

Abatement of action: Death of defendant: Real parties in interest.

2. An action of ejectment abates on the death of the sole defendant and occupant of the premises, and cannot be revived against his

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heirs or personal representatives claiming only as such. *Illinois Steel Co. v. Rogall,* 214

3. Where a defendant in ejectment transfers his interest and the possession of the land, he becomes a mere nominal party and the transferees become the real parties in interest, liable to be made defendants at any time under sec. 2801, Stats.; and the right to have such real parties in interest made defendants is not impaired by death of the nominal party. *Ibid.*

ELECTION OF REMEDIES. See HUSBAND AND WIFE, 7. RAILROADS, 20.

ELECTIONS.

Returns and canvass: Time for completion: Recount proceedings.

1. Under sec. 1, art. XIII, of the state constitution, the political year of the state commences on the first Monday of January of such year and all constitutional officers elected at the November election in any year are required to be circumstanced to take up their respective offices at such time. *State ex rel. Husting v. Board of State Canvassers,* 216
2. The legislative plan for accomplishing the requirement mentioned in the last foregoing paragraph, as embodied in ch. 5, Stats., undisturbed by ch. 328, Laws of 1911, inserted in said chapter at sec. 86, does not admit of any change which would, or might probably prevent such accomplishment. *Ibid.*
3. Such legislative plan contemplates a fixed limit of time for a county clerk to complete the canvass of election district returns, to decide upon the result, to issue certificates of election to county officers found elected, and to make returns of the result of the election as to state officers to the secretary of state. *Ibid.*
4. The statute requires the entire result of the county canvass to be covered by a single decision and the result, as to the state officers, to be included in a single return. *Ibid.*
5. The duty of the county canvassing board, independently of the law of 1911, is purely ministerial; it is required to obtain possession of the district returns within the time specified; it may have a remedy by *mandamus* to enable it to do so, if necessary, and may be compelled by *mandamus*, if necessary, to complete its work within the required time. *Ibid.*
6. The statute requires the secretary of state and state canvassing board to obtain possession of the county results by the time fixed by statute for commencement of continuous work of making the state canvass, to complete it, file the decision and issue certificates of election in the time limited by statute. *Ibid.*
7. Sec. 86, Stats. 1913, cannot be restrained so as to affect some officers and not others; it includes all so plainly as to preclude any different meaning being adopted by construction. *Ibid.*
8. Sec. 86, Stats. 1913, cannot be given such effect as to prevent making the county canvasses and state canvass within the time required by law, as that would be liable to prevent newly elected officers from taking their respective offices on the first Monday of the political year. *Ibid.*
9. If the legislative purpose was as indicated in sec. 86 in its letter so far as it, if executed, would prevent a county canvass and the state canvass from being completed within the time fixed by statute, it is unconstitutional. *Ibid.*

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10. If the legislature did not intend the law of 1911 to be restrained so as not to impair the efficiency of the existing law, the purpose is too much involved in obscurity to be discoverable with the reasonable degree of certainty essential to effect being given thereto. *Ibid.*

11. The statute requiring the state canvassing board to complete its work within a specified time is directory, to the extent that it may continue to a finality after expiration of the time, but it has no discretion to delay by adjournments or for anything but proceedings to compel transmission of the county returns, and, in case of delays otherwise, it may be coerced by the *mandamus* remedy. *Ibid.*

12. Under sec. 94*e*, Stats. 1913, the state board of canvassers must make its decision from the county returns mentioned in sub. 1, sec. 87, and from such returns only. The statute contemplates but one return and that to be an entirety. *Ibid.*

ELEVATORS. See MASTER AND SERVANT, 1.

EMBARGO. See CARRIERS, 6–8, 19, 20.

EMINENT DOMAIN. See MUNICIPAL CORPORATIONS, 1. RAILROADS, 6–9.

EMPLOYERS' LIABILITY ACTS. See WORKMEN'S COMPENSATION ACT.

EMPLOYERS' LIABILITY INSURANCE. See INSURANCE, 11, 12.

EQUAL PROTECTION OF THE LAWS. See CONSTITUTIONAL LAW, 19–22.

EQUITY.
Jurisdiction. See COURTS. REFORMATION OF INSTRUMENTS. SPECIFIC PERFORMANCE.
Adequate remedy at law. See ACTION, 1–4.
Laches. See MORTGAGES, 5–7. TOWNS, 8.

ESCROW. See CONTRACTS, 1, 2.

ESTATES OF DECEDENTS. See HOMESTEAD. WILLS.

ESTOPPEL.

Grounds. See INSURANCE, 9, 11. RELEASE. TOWNS, 7.

1. The law will not permit a person capable of understanding a contract to sign it, retain it, and afterwards avoid it upon the pretext that it was not understood. *McMillen v. Strange,* 271

Matters precluded.

2. The doctrine of estoppel cannot be successfully invoked to sustain acts of a town which are clearly *ultra vires*. *McGowan v. Paul,* 141 Wis. 388, followed. *Menasha W. W. Co. v. Winter,* 437

Pleading: Waiver.

3. An estoppel relied upon by plaintiff as the very groundwork of defendant's liability should be pleaded in the complaint, and if not so pleaded should be deemed to have been waived, at least where it would work hardship in that it would enrich plaintiff largely on account of acts of defendant which were but slightly, if at all, prejudicial to plaintiff. *J. S. Stearns L. Co. v. Travelers Ins. Co.* 627

4. Plaintiff's failure to plead estoppel in this case was not waived by defendant by failing to object to evidence under the complaint, substantially all facts alleged in the complaint being admitted, so that no evidence was necessary to prove them. *Ibid.*

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EVIDENCE.

Presumptions. See CARRIERS, 12, 17. COMPROMISE AND SETTLEMENT, 2. HUSBAND AND WIFE, 10, 12, 15. INSURANCE, 12. MORTGAGES, 3. WORKMEN'S COMPENSATION ACT, 9.

Burden of proof. See ASSAULT AND BATTERY, 2. CARRIERS, 15. HUSBAND AND WIFE, 2.

Relevancy, materiality, and competency. See LIBEL AND SLANDER, 8. TOWNS, 1.

Admissions. See TRIAL, 10.

Documentary evidence. See OFFICERS, 4. TOWNS, 1, 3.

1. A photograph of a sidewalk at the place where plaintiff was injured which, although it showed that there was a narrow piece out of the side of one of the boards, seemed to show that the space was too narrow to admit a human foot, is *held* not to be conclusive of the latter fact, although the plaintiff had the photograph taken, offered it in evidence, and vouched for its accuracy, where she also testified that her foot went through such hole and another witness testified that he examined the walk a few minutes after the accident and that the hole was there and was large enough to admit the plaintiff's foot. *Steinke v. Oshkosh,* 124

2. Maps and diagrams are frequently received in evidence with very slight proof of accuracy or authenticity when they constitute merely a picture or a summing up of evidence otherwise legitimately in a case; but when they are offered to establish an independent relevant fact—in this case the existence of a railroad right of way near certain land—they must be certified or verified or otherwise made competent under the same rules as apply to other documentary evidence. *Govier v. Brechler,* 157

Parol evidence affecting writings. See HUSBAND AND WIFE, 8. SPECIFIC PERFORMANCE, 1, 2.

3. Where a second-hand automobile was sold and delivered under a written contract, plain and unambiguous in its terms and containing a statement that there were no verbal understandings, promises, or agreements except those specified therein, parol evidence of representations as to the age and condition of the car, alleged to have been made by the vendors in negotiating the sale, was not admissible to vary the contract. *Jones v. Keefe,* 584

Opinion evidence. See WILLS, 2.

Weight and sufficiency. See ASSAULT AND BATTERY, 1. AUTOMOBILES. BILLS AND NOTES, 1. CARRIERS, 12, 13, 21, 22. COMPROMISE AND SETTLEMENT, 3. CONTRACTS, 5. CORPORATIONS, 9. DIVORCE, 1. EVIDENCE, 1. FRAUD, 8. FRAUDULENT CONVEYANCES. HUSBAND AND WIFE, 15. INSURANCE, 1. MASTER AND SERVANT, 2, 3. MUNICIPAL CORPORATIONS, 4. NEGLIGENCE, 3, 4, 8, 13. OFFICERS, 4, 5. RAILROADS, 8, 9. RAPE, 3, 6. REFORMATION OF INSTRUMENTS. SALES, 5. SEDUCTION, 1. SPECIFIC PERFORMANCE, 2, 4. STREET RAILWAYS, 1. TRIAL, 13. WILLS, 1, 3. WORKMEN'S COMPENSATION ACT, 3, 5, 8.

EXCEPTIONS. See APPEAL, 1–4. ASSAULT AND BATTERY, 2.

EXCESSIVE DAMAGES. See DAMAGES, 4, 5. MUNICIPAL CORPORATIONS, 8.

EXECUTORS AND ADMINISTRATORS. See HOMESTEAD.

EXEMPLARY DAMAGES. See LIBEL AND SLANDER, 5, 8.

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EXPERT TESTIMONY. See WILLS, 2.

FALSE REPRESENTATIONS. See FRAUD, 1–5. INSTRUCTIONS TO JURY, 3–7. INSURANCE, 1–3.

FELLOW-SERVANT. See INSURANCE, 11, 12. RAILROADS, 21.

FINES. See CONSTITUTIONAL LAW, 3.

FIRE INSURANCE. See INSURANCE, 1–4.

FIRES. See NEGLIGENCE, 8–12.

FISH AND GAME. See CONSTITUTIONAL LAW, 3.

FORECLOSURE. See MORTGAGES.

FOREIGN CORPORATIONS. See CORPORATIONS, 10.

FOREIGN LAWS. See CARRIERS, 1–3.

FORFEITURES. See INSURANCE, 5–9.

FRAUD.

See BILLS AND NOTES, 4. CORPORATIONS, 9. FRAUDULENT CONVEYANCES. HUSBAND AND WIFE, 1–3, 10, 12. INSTRUCTIONS TO JURY, 3–7. INSURANCE, 1–3.

Sale of note: Fraudulent intent: Evidence: Instructions.

1. In a tort action based upon false representations in the sale of property plaintiff need not show that the representations were made with fraudulent intent. *First Nat. Bank v. Hackett,* 113
2. Evidence in such case that defendant in good faith believed that the representations made were true is immaterial; but where plaintiff had introduced evidence on that question he cannot complain that defendant was allowed to rebut it. *Ibid.*
3. Although in such case it was immaterial whether the representations were made in bad faith or not, yet, the action being based on fraud, it was prejudicial error to instruct the jury that there was no claim and no evidence of fraud or bad faith on the part of the defendant. *Ibid.*
4. It was prejudicial error also to charge in such case that defendant denied that the alleged representations were made, where in fact defendant did not deny that any of the representations were made, except in a qualified way, and himself testified to making one of them. *Ibid.*
5. In a tort action based upon false representations as to the securities accompanying a note sold by defendant to plaintiff, it was immaterial whether or not the note would have been fully secured if plaintiff had subsequently agreed to an arrangement by which other securities were to be substituted, and no question upon that subject should have been included in the special verdict. Plaintiff had the right to stand upon the cause of action for fraud and was not bound to agree to the substitution of some other cause of action. *Ibid.*
6. So, also, it was immaterial and no question should have been submitted to the jury as to whether plaintiff could at one time have sold the note for twenty-five cents on the dollar. *Ibid.*

Sale of corporate stock: Confidential relations.

7. The fact that one stockholder in a corporation, in negotiating for the purchase of the shares of another stockholder toward whom he sustained confidential relations, made strong representations relative to the lack of integrity and the extravagance of the per-

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sons in control of the corporation and the ruinous results which were likely to follow from a continuance of their management, does not justify a finding of fraud in the purchase, where he acted in good faith and honestly and fully believed what he said was true, even though he had exaggerated ideas as to the impending danger. *McMillen v. Strange*, 271

8. The evidence in this case is *held* not to sustain findings of the trial court to the effect that defendant took advantage of confidential relations existing between himself and plaintiff and by overpersuasion and overreaching induced her to sell certain corporate stock to him; but, on the contrary, to show that in such purchase defendant dealt fairly and honestly with plaintiff and was guilty of no overreaching, unfair, or unconscionable conduct. *Ibid.*

FRAUDULENT CONVEYANCES.

A finding that a conveyance of land by husband to wife was made in fraud of creditors is *held* to be sustained by the evidence. *Bloede v. Lutz*, 89

FRAUDULENT REPRESENTATIONS. See FRAUD, 1–5. INSTRUCTIONS TO JURY, 3–7. INSURANCE, 1–3.

FREEDOM OF SPEECH. See CONSTITUTIONAL LAW, 16.

GOOD FAITH. See FRAUD, 2, 3, 7.

GOOD WILL. See PARTNERSHIP, 1.

GUARANTY.

Consideration: Infant's contract: Disaffirmance: Liability of guarantor: Acceptance: Extension of time: Notice of default: Release.

1. A written contract of guaranty stating that it is "for value received," and clearly made for the benefit of the principal contractor, is supported by a legal consideration. *International Textbook Co. v. Mabbott*, 423

2. The rule that the liability of the principal debtor measures and limits the liability of the guarantor, does not obtain where the principal is an infant or otherwise incapacitated to contract and the guarantor knows thereof. *Ibid.*

3. Thus, although an infant disaffirmed his contract to pay in instalments the price of a scholarship in a correspondence school, one who absolutely guaranteed the payment of such price in accordance with the terms of the contract is liable on such guaranty; and his liability is not limited to the amount due at the time of disaffirmance by the infant. *Ibid.*

4. Where in such case the guarantor was not induced to sign the guaranty by any active misrepresentation, and immediately below his signature was a printed statement showing a plain intent that he was to assume an absolute obligation for a minor, mere ignorance of the contents of the writing or of the fact that the principal contractor was a minor would not relieve the guarantor from his obligation. *Ibid.*

5. A guarantor may by a stipulation in the contract waive notice of the acceptance of his guaranty. *Ibid.*

6. Where the contract of guaranty is an absolute and direct promise to pay if the principal debtor does not, so that upon acceptance the agreement is complete, the guarantor is not entitled to notice of acceptance. *Ibid.*

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7. Nor under such a contract need the guarantor be notified of a default by the principal debtor. *Ibid.*

8. Mere indulgence to the principal debtor by a collector who had no authority to extend the time for payment, is not such an extension as would release a guarantor. *Ibid.*

Assignment of guaranty bond: Limitation of actions: Discharge of sureties.

9. A bond guaranteeing repayment by an employee of advances made to him by his employer cannot be assigned generally so far as future defaults of the employee are concerned, but a cause of action which has already arisen in favor of the employer, and the liability of the guarantors on the bond so far as it protects that cause of action, are assignable. *John A. Tolman & Co. v. Smith,* 361

10. Where a guaranty bond under seal provides that the sureties will themselves pay any amount which may become due from an employee to his employer under the contract of employment, the sureties are not discharged of liability on such independent promise by the mere fact that an action against the employee on the original debt is barred by the statute of limitations. [Whether a surety who makes simply a collateral agreement of guaranty would be discharged in such case, not determined.] *Ibid.*

HEIRSHIP. See ADVERSE POSSESSION.

HIGHWAYS.

See OFFICERS, 1.

1. No formal return of service of the notice of a meeting of the town supervisors to decide upon an application for laying out a highway being required, where there is proof by affidavit that the affiant "personally served" the notice upon the occupants of the land affected, and the order thereafter made laying out the highway recites that the supervisors were first satisfied by due proof that the required notice had been duly given, due service is, under secs. 1268, 1298, Stats., sufficiently proved, and in order to impeach the record failure of service must affirmatively appear. *State ex rel. Maughan v. Boerner,* 201

2. Under sub. 2, sec. 1291, Stats., approval of the award of damages and acceptance of the highway by the electors of the town is not necessary, although the award exceeds $500, unless it also exceeds one tenth of one per cent. on the taxable property of the town. *Ibid.*

3. Secs. 1236–1237*a*, Stats., provide for appraisement of such damages only as are caused by the acts of the superintendent of highways or persons under his direction who enter upon lands adjoining to or near a highway under the authority of said sections for the purposes therein mentioned, but not of the damages caused by any wrongful acts in the improvement of the highway—such as diverting the course of a creek within the limits of the highway—without entry upon any adjoining land. *Smith v. Onalaska,* 290

HOMESTEAD.

The mere fact that it is necessary to sell the homestead of a testator in order to divide it between his children to whom he devised it and who were, under sec. 2280, Stats., entitled to "take the same free of all judgments and claims against the testator

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or his estate," does not render the proceeds of such sale subject to the payment of the general debts of the estate. *Foote v. Foote,* 179

HOMICIDE.

Set-guns: Degree of offense.

1. Where all the elements necessary to constitute the offense of setting a gun under sec. 4394, Stats., existed, and the death of a person was caused by the discharge of such gun, the homicide cannot be deemed justifiable or excusable but is at least manslaughter in the second degree; and the killing of a person by means of a set-gun may be a higher crime, depending on the intent of the person setting it or other facts characterizing the act. *Schmidt v. State,* 15
2. Setting a gun to frighten boys who were likely to enter the premises for the purpose of stealing apples is within the terms of sec. 4394, Stats., which makes it an offense to set a gun "for the purpose of killing game of any kind . . . or for any other purpose." *Ibid.*
3. Where, upon the undisputed evidence, the defendant was at least guilty of manslaughter in the second degree under sec. 4394, Stats., there was no error in excluding from the jury's consideration any crime of less degree; nor, there being evidence tending to show that the offense was of higher degree, was it error to charge that defendant was guilty of some crime and that it was for the jury to determine of which crime he was guilty. *Ibid.*
4. In such a case it was not error to charge: "The jury have the power, if they see fit, to acquit the defendant of all crime, but in case you should do so you would disregard the undisputed facts and the law applicable to this case." *Ibid.*
5. Defendant having set a gun in his orchard in such a way that its contents would probably be discharged against any person coming in contact with a wire attached to the trigger and extended for some distance near the ground, and there being evidence of malice, deliberation, depravity of mind evincing disregard for human life, and intent to injure whoever might enter the orchard for the purpose of stealing apples, a conviction of murder in the second degree under sec. 4339, Stats., is sustained. *Ibid.*

HUSBAND AND WIFE.

Antenuptial contracts: Property rights.

1. The fact that there were mutual promises of marriage preceding an antenuptial agreement as to property matters does not constitute a badge of fraud; much less is it, in itself, a ground for declaring the contract void as against public policy. *Bibelhausen v. Bibelhausen,* 365
2. An antenuptial agreement whereby dower and other rights are released by the prospective wife must be free from fraud or imposition and will be regarded with rigid scrutiny, but the burden of proof is upon the party alleging fraud and it must be established by clear and satisfactory evidence. *Ibid.*
3. Facts which might establish fraud in an antenuptial agreement between a young and inexperienced woman and a man of superior business acumen may be given much less weight where the parties were advanced in years, had been married before, and the

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second marriage was largely a business arrangement to secure a home. *Ibid.*

4. If the minds of the parties met as to such agreement and they executed it understandingly, the mere fact that it was not as fair as it would seem to the court it ought to have been gives no warrant for disturbing it. *Ibid.*

5. The right to make an antenuptial agreement settling property matters by treaty existed before the statute (secs. 2167–2171, Stats.) and was not taken away thereby. Such an agreement should not be confused with the legal jointure provided for in sec. 2167. *Ibid.*

6. Sec. 2169, Stats., providing for the barring of dower by "any pecuniary provision which shall be made for the benefit of an intended wife," does not make it essential to the validity of an antenuptial contract that there be an adequate provision for support of the wife after the husband's death. Anything of value given as a provision satisfies the technical requirement. *Ibid.*

7. An antenuptial agreement, executed by the intended wife only, by which, for a sufficient consideration paid or to be paid, she releases all future claims upon her intended husband's property or estate, including dower right, is not subject to an election by her not to be bound thereby. Sec. 2170, Stats., contemplates a conveyance made by the intended husband and not assented to by the intended wife, and is therefore inapplicable; as are also sec. 2172 and sub. 2, sec. 2172*a*, fixing the time for election. *Ibid.*

8. In such an agreement the mention of the consideration and the formal acknowledgment of receipt thereof are mere recitals, not contractual in character, which may be explained or varied, but not so as to vary or defeat the instrument for the purpose for which it was given. *Ibid.*

9. Even if the pecuniary consideration named in such an agreement was not actually paid at the time the agreement was made or thereafter during the lifetime of the husband, that fact does not, in itself, render the agreement void or affect it in any way as a surrender of marital rights in his property. The instrument, under such circumstances, will be construed as containing an implied promise to pay, which may be enforced. *Ibid.*

10. Although in such case the widow might be precluded, under sec. 4069, Stats., from testifying as to the facts respecting payment of the consideration, no presumption of fraud should on that account be indulged in to avoid the agreement; but, in the absence of evidence to the contrary, the presumption should be that there was some understanding in respect to the matter consistent with the recital, as that the money to be paid was retained by the deceased for the wife at her request and as her trustee, possession by her to wait upon some future event which could not be postponed later than the *post-mortem* distribution of his estate. *Ibid.*

11. In any event the rights of the widow in such a case become fixed at the time of the husband's death. *Ibid.*

12. Although marriage itself is, under some circumstances, a sufficient consideration for a release by the intended wife of marital rights in the future husband's property, an efficient presumption of fraud may arise from a grossly inadequate or manifestly unfair pecuniary consideration for such release. *Ibid.*

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13. Circumstances bearing upon the question whether the pecuniary consideration for such a release is so grossly unfair as to give rise to a presumption of fraud include the age of the parties, their position in life, the reasonable expectations of a pecuniary nature surrendered, based not only on present possessions but also on the ability of the intended husband to acquire property, the needs of the intended wife, and the extent to which companionship and home life were the real inducement to the marriage without thought of property advantages. *Ibid.*

14. Subsequent conduct of the husband may also be considered,—such as, in this case, the making of generous provision for the widow in his will by way of annuity and otherwise. *Ibid.*

15. Testimony of one who signed an antenuptial agreement releasing her marital rights in the property of her intended husband, that when she signed the instrument she did not know what was in it, is of little weight in face of the presumption to the contrary, an entire absence of proof that any artifice was used to prevent her knowing the contents and clear testimony that the paper was explained to her before she signed, and the fact that she made no complaint about it until after her husband's death some eleven years later. *Ibid.*

16. The fact that an antenuptial agreement, whereby the intended wife released marital rights in the property of the intended husband, in terms precluded her from making any claim upon his estate in the event of a separation after marriage, as well as in case of his death, did not render the release void as against public policy. [Whether the agreement would be binding on the wife in case of a separation, not decided.] *Ibid.*

17. The right to make antenuptial agreements settling property matters in advance, while it should be carefully guarded against abuse, is a valuable personal right which should not be interfered with or regulated destructively, nor its exercise looked upon with disfavor. *Ibid.*

Conveyances. See FRAUDULENT CONVEYANCES.

IMPEACHMENT OF OFFICIAL DOCUMENTS. See TOWNS, 3.

IMPLIED COVENANTS. See LANDLORD AND TENANT, 3–7.

INCOME TAX. See CONSTITUTIONAL LAW, 11–14. TAXATION, 6–13.

INDUSTRIAL COMMISSION. See WORKMEN'S COMPENSATION ACT, 2–6, 8.

INFANTS. See GUARANTY, 2–4. INSURANCE, 11, 12. LIMITATION OF ACTIONS, 1. NEGLIGENCE, 3. SEDUCTION.

INJUNCTION. See ACTION, 3, 5.

INSTRUCTIONS TO JURY.

General rules.

1. The mere fact that an instruction was somewhat confused in its language is immaterial where it must have been understood by the jury in its proper sense. *Hyde v. State,* 651

Requests for instructions. See INSTRUCTIONS TO JURY, 2.

Assault and battery. See ASSAULT AND BATTERY, 2.

Burden of proof. See ASSAULT AND BATTERY, 2.

Carriers. See CARRIERS, 16, 17.

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Degree of proof. See ASSAULT AND BATTERY, 2.

2. In a civil action where one of the facts essential to a recovery also constitutes a crime the jury must be satisfied of the existence of such fact by a clear and satisfactory preponderance of the evidence; but an instruction in this case that the jury must be satisfied "by a fair preponderance of the evidence and to a reasonable certainty," is *held* to be so slight a departure from the rule that, in the absence of any request for more explicit instructions, the error cannot be deemed prejudicial. *Trzebietowski v. Jereski,* 190

Fraud. See FRAUD, 3.

Fraudulent representations. See FRAUD, 4.

3. An instruction that "It is a general rule of law that statements as to the value of property, real or personal, or as to the financial responsibility of persons, made for the purpose of inducing another to buy, may be and generally are mere expressions of opinions," was erroneous as applied to the evidence in this case and was prejudicial. *First Nat. Bank v. Hackett,* 113

4. An instruction in this case from which the jury would be likely to understand that unless defendant positively vouched for the truthfulness of the statement made by him it would not constitute a false representation, was erroneous. *Ibid.*

5. An instruction from which the jury would be likely to understand that plaintiff did not rely upon defendant's representation as to certain securities sold by defendant, but upon the defendant personally, was misleading in this case, that being under the evidence a question for the jury. *Ibid.*

6. Statements by defendant not having been made as upon information or as matter of opinion but as positive statements of fact, it was misleading to charge the jury that if what defendant said "was a truthful statement of his information upon the subject, and given as such only," there was no false representation. *Ibid.*

7. It being undisputed that a mortgage by which a note sold by defendant to plaintiff was supposed to be secured was in fact executed by a "dummy" as mortgagor, who had no title to the property and acquired none, and that such mortgage was worthless, it was error to give an instruction calculated to lead the jury to believe that if there was a contract between third persons and the defendant to perfect title in the dummy mortgagor it was sufficient to satisfy defendant's representation that there was a valid mortgage, although none in fact ever existed. *Ibid.*

Homicide. See HOMICIDE, 3, 4.

Landlord and tenant: Breach of agreement to plow. See LANDLORD AND TENANT, 9.

Libel. See LIBEL AND SLANDER, 4, 11.

Negligence: Operation of traction engine. See NEGLIGENCE, 12.

Same: Wilful act: Gross negligence.

8. Where a question submitted to the jury asked whether defendant wantonly, wilfully, and maliciously ran his automobile against that of plaintiff, and the jury were correctly charged that if the accident happened in the way claimed by plaintiff the only conclusion to be drawn was that defendant wilfully and wantonly committed the act, there was no need for any abstract instruction on the subject of gross negligence. *Dishmaker v. Heck,* 572

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Presumptions. See CARRIERS, 17.

Sales: Quantity delivered.

9. In an action to recover the purchase price of logs, the only question being whether the plaintiff's or the defendant's scale of the logs was correct, the court properly instructed the jury to that effect and that if they found the scale of the logs as claimed by the plaintiff to be correct they must find in his favor for the unpaid balance of the purchase price. *Olson v. White Star L. Co.* 391

10. The admission in evidence in such case of a tabulated statement of the quantity of the different kinds of logs delivered by plaintiff and the amount due therefor at the agreed price, and the use of such memorandum by a witness who testified to the scaling of the logs, that he had made entry thereof in a book, and that the items in the memorandum were accurate, was not prejudicial error, it being clear that the witness had personal knowledge of the transaction referred to and that he testified from such knowledge. *Ibid.*

Schools: Discharge of teacher. See SCHOOLS AND SCHOOL DISTRICTS, 3.

Seduction. See SEDUCTION, 3.

INSURANCE.

State insurance of public property. See STATES.

Lightning: Loss of horse: Fraud.

1. In an action upon a mutual insurance policy to recover for loss of a horse claimed to have been injured by lightning, the evidence is *held* to sustain findings by the jury to the effect that the condition of the horse was not the result of injury from lightning, and that by false and fraudulent representations plaintiff had induced defendant's officers to include his claim in an assessment levied by them. *Lewis v. Farmers' Mut. F. Ins. Co.* 547

2. Under an answer alleging that plaintiff made such false and fraudulent representations, it was competent to show that he caused the representations to be made to the defendant through a veterinary surgeon by means of wilful, intentional misstatements to the later or concealment of material facts from him; and the effect of the representations so made was the same as if plaintiff made them personally. *Ibid.*

3. The inclusion of plaintiff's claim among those for which the assessment was levied, having been induced by fraud, had no binding force as an adjustment or settlement of the claim. *Ibid.*

4. Plaintiff being a member of the defendant company and insured against loss on other property, the amount paid by him on such assessment was properly retained by defendant, the fact that the loss of the horse was not covered by his policy making no difference. *Ibid.*

Mutual benefit insurance: By-laws: Forfeiture.

5. A stipulation in a mutual benefit certificate that the insured shall be bound by by-laws thereafter adopted is valid, and such a by-law will be binding upon him if the change made thereby is simply a change in a matter of detail deemed necessary or advisable to carry out the fundamental principle or plan of insurance, and not a change in a substantial part of the plan itself or a nullification of the existing insurance contract. *Curtis v. Modern Woodmen of America.* 303

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6. Thus, under such a stipulation, a subsequently adopted by-law providing that if any member "heretofore or hereafter adopted shall become intemperate . . . or if his death shall result directly or indirectly from his use of intoxicating liquors," his certificate shall become null and void, is valid and binding upon the insured and the beneficiary. *Ibid.*

7. Such by-law provides for two separate and distinct contingencies in which the certificate shall become void: (1) where a member becomes intemperate after the passage of the by-law, and (2) where a member's death results directly or indirectly from his use of intoxicating liquors, regardless of the time when his intemperance began. *Ibid.*

Same: Suicide: Forfeiture: Waiver.

8. Where an assessment was fully earned and was due, so that there was an absolute liability for its payment, before the death of a person insured under an assessment policy, acceptance of such assessment after his death did not waive a forfeiture occurring after the assessment became due, nor estop the insurer to insist upon such forfeiture. *Bennett v. Beavers Reserve Fund Fraternity,* 145

9. Thus, where an assessment was fully earned and became due so that the liability to pay it was absolute on the first day of the month, although payment might be made without penalty at any time before the end of the month, and thereafter, during the month, the insured took his own life, subsequent acceptance of such assessment by the insurer with full knowledge of the cause of death did not operate as a waiver or an estoppel with respect to a forfeiture resulting from such suicide. *Ibid.*

Accident insurance: Suicide: Evidence.

10. In an action upon an accident policy, the main question being whether the assured, who died from a bullet wound, intentionally shot himself (thus avoiding the policy) or was shot by his mistress, and she having been charged with murder, so that it was to her interest as well as that of the insurance company that she should testify that the assured shot himself and should also testify to any and all facts which would point that way, evidence that there had been consultations between her or her attorney and the insurance company's claim agent prior to her testifying in the action on the policy, was competent on behalf of plaintiff as bearing on the credibility of the woman's testimony. *Andrews v. United States C. Co.* 604

Employers' liability insurance: Risks covered: Illegal employment of minor.

11. Under a policy insuring against loss by accidents to the employees of the assured, injuries caused by persons employed in violation of law were not within the risk insured against. In case of an accident the assured was to give notice to the insurer, with full information and particulars. Death of an employee was caused by negligence of a co-employee under sixteen years of age, employed without proper permit. The facts as to such illegal employment were not brought to the attention of the insurer, but it was told that the boy was over sixteen when employed, and it defended an action against the assured on account of said death. Incompetence of the boy was alleged in that action, and on that issue his mother testified that he was under sixteen, while he testified that he was over that age. There was no evidence as to

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whether or not he had a permit, no question as to the legality of his employment being raised. Other claims of negligence were made which were within the risk insured against. *Held*, that the insurer did not, by continuing to defend that action, estop itself from claiming, in a subsequent action by the assured on the policy, the benefit of the provision excepting from the risk accidents like that in question. *J. S. Stearns L. Co. v. Travelers Ins. Co.* 627

12. Employment of the boy under sixteen years of age without proper permit, in violation of ch. 338, Laws of 1909, being a misdemeanor, the presumption, from the standpoint of the insurer, was that the employment was legal, and evidence that he was under sixteen, with no evidence as to whether or not he had a permit, did not overcome that presumption. *Ibid.*

INTEREST.

See COUNTIES, 6, 7. DAMAGES, 1. MORTGAGES, 1, 2.

Under sec. 1689, Stats., where neither the interest coupons nor any other writing provided that the interest due on bonds should bear interest from maturity, no interest on the amounts of said coupons is recoverable. *First S. & T. Co. v. C. & S. C. R. Co.* 344

INTERLOCUTORY JUDGMENT. See DIVORCE, 2-4.

INTERSTATE COMMERCE. See CARRIERS, 1-3, 10. COMMERCE. CORPORATIONS, 10. RAILROADS, 15-21.

JOINDER.
Of causes of action. See ACTION, 5.
Of parties. See CARRIERS, 4.

JOINTURE. See HUSBAND AND WIFE, 5.

JUDGES.

Disqualification to act.

A collateral or indirect interest in a controversy will not disqualify a judge from hearing and determining the same, where there is no other judicial officer or body before whom the case can be taken for decision. *State ex rel. Wickham v. Nygaard,* 396

Salaries: Income tax. See CONSTITUTIONAL LAW, 4.

JUDGMENT.
Interlocutory judgment. See DIVORCE, 2-4.
Conclusiveness of adjudication. See TOWNS, 4, 5.

JUDICIAL POWERS. See CONSTITUTIONAL LAW, 4-10.

JURISDICTION. See COMMERCE. CONSTITUTIONAL LAW, 10. OFFICERS, 8. PROCESS.

JURY.

Right to trial by jury. See CONSTITUTIONAL LAW, 19-22.

Competency of jurors.

In an action based on a collision between automobiles driven by rival dealers, a juror stated on his *voir dire* that he had dealt with plaintiff but that he owed him nothing, that he owned no car, and that he was not negotiating with plaintiff for a car. It afterwards appeared that before the trial the juror had ordered a car from plaintiff and that it was delivered and paid for immediately after the rendition of the verdict. *Held* that, the

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statements of the juror being literally true and the trial court being satisfied that he was competent and fair, there was no error in refusing a new trial. *Dishmaker v. Heck*, 572

Custody, conduct, and deliberations. See TRIAL, 3–6.

JUSTIFICATION. See HOMICIDE, 1. LIBEL AND SLANDER, 2, 4, 10.

LACHES. See MORTGAGES, 5–7. TOWNS, 8.

LANDLORD AND TENANT.

Covenant by lessee as to use of premises: Wrongful exclusion of lessee: Damages.

1. Words in a lease, "the said premises to be used for the purpose of hotel and saloon and bathing grounds," did not amount to a condition or covenant that the lessee would use the premises continually for the purposes named, and his failure to do so gave the lessor no right of re-entry under a provision that the lease should be void if the lessee should "use said premises, or any part thereof, contrary to the conditions" therein contained. *Henry Rahr's Sons Co. v. Buckley*, 589
2. A lessee who has been wrongfully prevented by the lessor from using the leased premises for a portion of the term for which the rent has been paid, may recover their rental value for that portion of the term. *Ibid.*

Covenants by lessor: Failure to obtain possession: Remedies.

3. Although a lease contains covenants binding the lessee to make certain repairs and to do certain other things with reference to the leased premises, the lessor does not for that reason *expressly* covenant that the lessee be given possession; and under secs. 2204, 2242, Stats., if the lease be for a term exceeding three years no covenant to put the lessee in possession can be implied. *Goldman v. Dieves*, 47
4. When the lessor in a lease for a term exceeding three years is unable to deliver possession to the lessee, such lessee, even though not protected by proper covenants, may withhold the rent or, if paid, recover it back for the period for which possession has been withheld. *Ibid.*
5. For acts of the lessor in such a case which tended to prevent the lessee from obtaining possession and were in derogation of the lease, the lessee may recover damages although the lease contained no express covenant by the lessor to put him in possession. *Ibid.*
6. A bonus paid prior to the execution of a lease for a term exceeding three years without covenants by the lessors to deliver possession or as to quiet enjoyment, to secure such lease at that time in advance of the termination of an existing lease to another person, cannot be recovered back by the lessee even though he is unable to secure possession at the beginning of his term. *Ibid.*
7. A covenant by lessors of premises to be used as a jewelry store that during the term (which was to commence at the termination of another lease) no other jewelry store should be *allowed* in any portion of the building of which the leased premises were a part, was not breached by the fact that a tenant then using the leased premises as a jewelry store wrongfully held over after his term in defiance of the lessors, who proceeded to put him out as soon as the law would permit. *Ibid.*

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Letting farm on shares: Breach of agreement by lessee: Division of produce.

8. Where, in the lease of a farm upon shares, the lessee agreed that when he left at the end of the term he would leave a certain number of acres plowed, evidence that because of bad weather he did not have time to do the plowing before the termination of the lease and that thereafter he was refused the use of the lessor's horses to do the plowing did not show any legal excuse for failure to perform; and the admission of such evidence was prejudicial error. *Klas v. Kuehl,* 561

9. So, also, refusal to instruct the jury that the lessor was entitled to reimbursement for such failure to plow was prejudicial error. *Ibid.*

10. Strawberries and grapes are "fruit" within the meaning of a lease of a farm upon shares. *Ibid.*

11. Under a lease of a farm upon shares, providing that the lessor should place not less than twenty-five cows on the farm and not less than eight horses for working purposes, that "said stock and horses" should be and remain his property, and that he should have two thirds, and the lessee one third, of the increase of stock, a catch colt foaled by one of the working horses was not "increase of stock." *Ibid.*

LEGISLATIVE POWERS. See CONSTITUTIONAL LAW, 4. ELECTIONS, 9.

LIBEL AND SLANDER.

Newspaper articles: Attorney at law: Evidence: Damages:

1. Whether a particular publication would ordinarily be so understood as to be libelous is generally a question of law, although sometimes the characterizing circumstances are such that it is a question of fact, or of mixed law and fact. *Williams v. Hicks Printing Co.* 90

2. If a newspaper article naturally tends to make a person appear ridiculous or contemptible or a subject of hatred, or to disgrace him in society or injure him in his business, the right to recover general damages follows as a matter of course, in the absence of truth as a justification or of circumstances of legal excuse. *Ibid.*

3. A newspaper article in which a reputable lawyer, long in practice and of high standing, was referred to as "an attorney who seems to be entirely ignorant of the first principles of decent courtesy or fairness," as a "puny little member of the bar," and as a "legal neophyte," was libelous as a matter of law. *Ibid.*

4. In an action based on such article, no justification having been shown and there being no evidence to indicate that plaintiff's character was not such as to be affected in the ordinary degree thereby, and affirmative evidence that the injury was possibly above the ordinary, it was error to refuse to instruct the jury that the article was libelous *per se* and that plaintiff was entitled to recover his actual damages regardless of whether the publication was made with bad motives or not; and the jury should further have been made to appreciate that nothing short of substantial damages within the field of general damages would be adequate to the case. *Ibid.*

5. It was error in such case to refuse to receive in evidence other articles published in defendants' newspaper leading up to the one

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in question, and articles subsequently published up to the time the case went to the jury, all of which had a material bearing upon the questions of malice and punitory damages. *Ibid.*

6. For the publication of such articles during the trial, defendants should have been reprimanded and perhaps punished by the trial court. *Ibid.*

7. It was error to permit defendants' witnesses to testify to their conclusions, opinions, and impressions in respect to the occurrences before the board of review with reference to which the libelous article was published, and to refuse to permit plaintiff to prove just what was said and done before the board of review. *Ibid.*

8. It was error, also, to permit one of the defendants to testify as to what he meant by the use of the particular expressions used in the libelous article and his conception of his duty and his rights as a newspaper publisher, or at least such testimony should have been confined to the question of exemplary damages. What the author intended, in such a case, is immaterial on the question whether the article is libelous or what sum of money will measure the loss caused. *Ibid.*

Same: Conditional privilege.

9. Conditional privilege as regards newspaper publications does not go beyond fair criticism in respect to the relations of persons to the public and report of facts. It does not extend to false statements of fact or unjust inferences, nor taunts, nor contemptuous and insulting phrases. *Williams v. Hicks Printing Co.*, 90

Justification and mitigation of damages.

10. Mere good faith, honest belief in the truth of the publication, good motives, accident, or inadvertence is not of itself a defense or sufficient to mitigate the actual damages recoverable. *Williams v. Hicks Printing Co.* 90

Same: Retraction.

11. An offer by defendants to retract any statement in the libelous article if plaintiff would produce to them satisfactory proof of its incorrectness, and to publish any signed article plaintiff might furnish for that purpose, subject to such comments as defendants might see fit to make, the offer being accompanied by a suggestion of still greater humiliation of plaintiff if he resorted to legal remedies for redress, was not such an offer as should be considered in mitigation of the wrong, and the jury should, on plaintiff's request, have been so instructed. *Williams v. Hicks Printing Co.* 90

Criminal slander. See CONSTITUTIONAL LAW, 16–18.

LIFE INSURANCE. See INSURANCE, 5–9.

LIGHTNING. See INSURANCE, 1. WORKMEN'S COMPENSATION ACT, 1, 5.

LIMITATION OF ACTIONS.

See ADVERSE POSSESSION.

Injury to person: Notice. See RELEASE.

1. An instrument executed by a minor, in the nature of a release of damages for a personal injury, which not only failed to show that claim for damages would be made but imported on its face that no claim would be made, cannot be deemed such a notice of

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the injury as is provided for in sub. 5, sec. 4222, Stats. *Staszczuk v. Gilman Mfg. Co.* 615

Fraud: When cause of action accrues. See CORPORATIONS, 6.

2. The provision of sub. 7, sec. 4222, Stats., that a cause of action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud, relates to a fraud for which the sole redress is an action in equity. *Casper v. Kalt-Zimmers Mfg. Co.* 517

Recurrent nuisance. See RAILROADS, 7.

MACHINERY. See NEGLIGENCE, 4–12.

MALICE. See LIBEL AND SLANDER, 5.

MANDAMUS. See ELECTIONS, 5, 11.

MANDATE ON REVERSAL. See APPEAL, 4, 10.

MANSLAUGHTER. See HOMICIDE, 1, 3, 5.

MAPS and diagrams. See EVIDENCE, 2.

MARRIAGE: Annulment. See DIVORCE, 4.

MARRIED WOMEN.

See DOWER. HUSBAND AND WIFE.

A married woman who carries on a separate business in her own name can recover in her own name damages for any injury to her earning power in that business. *Hutchinson v. Oshkosh*, 141

MASTER AND SERVANT.

Liability for injuries to servant. See RAILROADS, 12–21. RELEASE. WORKMEN'S COMPENSATION ACT.

Same: Machinery, appliances, and places for work: Elevators: Contributory negligence.

1. The platform of a freight elevator in a paper mill stood open and at the level of an upper floor, with a bale of paper stock weighing 700 or 800 pounds upon it. The cables of the elevator were partially unwound and hung loose on or below its top. An employee wishing to go to a lower floor stepped upon the platform, and the elevator at once fell to the basement and he was injured. *Held*, that the question of his contributory negligence was for the jury. *Westberg v. Kimberly-Clark Co.* 64

Same: Moving loading rig without warning.

2. Findings by the jury to the effect that defendant was negligent in failing to promulgate rules requiring the giving of a signal before moving the loading rig by which plaintiff was injured; that the engineer was negligent in not sounding a warning; and that plaintiff was not guilty of contributory negligence, are *held* to be sustained by the evidence. *De Grand v. Barkhausen C. & D. Co.* 599

Same: Death from falling tree.

3. In an action for death of a woodsman who, while engaged with others in opening up a logging road, was killed by a tree felled by another of the crew, findings of the jury to the effect that defendant was actionably negligent in permitting the work to be done as it was without the giving of proper warnings are *held* to be sustained by the evidence, although the trial court ruled to the contrary. *Gillett v. Flanner-Steger L. & L. Co.* 578

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Same: Fellow-servants. See INSURANCE, 11, 12. RAILROADS, 21.

Same: Assumption of risk: Contributory negligence. See MASTER AND SERVANT, 1, 2. RAILROADS, 12, 13, 21.

4. An employee of a brewing company who, while driving out of an alley and across a private track in the brewery grounds, was injured by a railway car which had been shunted in upon such track without warning, and who had full knowledge that cars for the use of the brewing company were constantly shunted in upon such track in that manner, is *held*, as between himself and his employer, to have assumed the risk. *Knauer v. Joseph Schlitz Brewing Co.* 7

5. Although assumption of risk has often been spoken of as a form of contributory negligence, there is a distinction between the two, and one may exist without the other. Assumption of risk, in its strict sense, exists only as an incident of contractual relations and does not involve violation of any legal duty; while contributory negligence, strictly so called, does not necessarily arise from contractual relations and is a violation of duty. *Ibid.*

6. Although an employee of a brewing company had, as between himself and his employer, assumed the risk of injury from cars shunted in by a railway company upon a private track of the brewing company, such assumption of risk did not absolve the railway company from its obligation to exercise ordinary care, nor was it necessarily contributory negligence as to the railway company. *Ibid.*

7. Whether, under the circumstances of this case, the railway company was negligent in shunting the car in upon the private track without warning, and whether plaintiff was guilty of contributory negligence in attempting to cross the track as he did, were questions for the jury. *Ibid.*

Same: Insurance against liability. See INSURANCE, 11, 12.

MAXIMS.
Absoluta sententia expositore non indiget, 227.
An action is given to every one who is injured, 442.
An action is not given to one who is not injured, 442.
Ejusdem generis, 23.
Equity aids the diligent, 570.
Qui facit per alium facit per se, 551.
There is reason in all things, 478.

MEASURE OF DAMAGES. See DAMAGES. LANDLORD AND TENANT, 2. LIBEL AND SLANDER, 4. MUNICIPAL CORPORATIONS, 6–8.

MEETINGS OF CORPORATIONS. See CORPORATIONS, 8. RELIGIOUS SOCIETIES.

MILWAUKEE CIVIL COURT. See AUTOMOBILES, 2. CONSTITUTIONAL LAW, 20–22. REPLEVIN.

MINORS. See GUARANTY, 2–4. INSURANCE, 11, 12. LIMITATION OF ACTIONS, 1. NEGLIGENCE, 3. SEDUCTION.

MISTAKE. See CORPORATIONS, 4. REFORMATION OF INSTRUMENTS.

MITIGATION of damages. See LIBEL AND SLANDER, 10, 11.

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Foreclosure: Mortgage securing bonds: Priority as to interest payments.

1. A trust deed of railroad property provided that it was given to secure the "*pro rata* payment" of certain "bonds and the interest thereon," and that it should secure "equally dollar for dollar all of said bonds of all denominations without preference or priority of one bond over another." It also provided that if the trustee should take possession of and operate the railroad he might, after paying current expenses out of the revenue obtained from such operation, use such surplus revenue, "first, to the payment in full, without giving preference, priority, or distinction to one bond over another of those hereby secured, of the interest due, if such net income be sufficient, but if not then *pro rata*." *Held*, that the only preference in making interest payments was given in case such payments could be made out of the earnings of the road, and that as to the fund realized on a sale of the property, interest past due at the time subsequently maturing bonds were, under an option in the deed, declared to be due, was not entitled to any preference or priority over the principal and interest so declared to be due. *First Savings & T. Co. v. Cazenovia & S. C. R. Co.* 344

Same: Limitation of actions: Adverse possession: Laches.

2. A mortgage may be foreclosed although action on the note secured thereby is barred by limitation; and in such foreclosure action interest may be recovered on the principal sum if the mortgage and note provide for interest. *Bur v. Bong.* 498

3. Possession of mortgaged premises by the mortgagor is presumed to be in subordination to the rights of the mortgagee, until it is shown to be in fact adverse; and this rule applies to a purchaser from the mortgagor, where the mortgage was duly recorded prior to the conveyance, although the purchaser had no actual notice thereof. *Ibid.*

4. Possession does not become adverse in such a case without some distinct and positive act on the part of the occupants sufficient to bring to the mortgagee's notice the hostile character of the possession. *Ibid.*

5. An action to foreclose a mortgage, like other equitable actions, is subject to be defeated by the equitable defense of laches; and even where the action is not barred by the statute of limitations relief may be denied, in case of unjustifiable delay, where enforcement of the mortgage would lead to unconscionable and inequitable results. *Ibid.*

6. As between mortgagor and mortgagee in this case, the mere failure of the latter, for a period of nineteen years, to collect interest or take any steps to foreclose the mortgage security, was not such laches as should preclude enforcement of the mortgage. *Ibid.*

7. But as against a grantee of a part of the mortgaged premises who paid full value therefor and afterwards made improvements without actual knowledge of the mortgage, although it was recorded, a delay by the mortgagee for nineteen years to assert any claim under the mortgage, resulting in an accumulation of interest exceeding the amount of the principal, and otherwise

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seriously prejudicing the grantee's interests, constituted such laches that the court should refuse to enforce the mortgage against the part so conveyed. *Ibid.*

MUNICIPAL CORPORATIONS.

Improvements: Taking land for alley: Assessment of benefits.

1. Where a part of certain land is taken by a city for an alley, and in the condemnation proceedings the special benefits resulting to the landowner are, under sec. 899, Stats., deducted from the amount awarded as damages, the city cannot thereafter, under sec. 903, levy a special assessment upon the residue of the land on account of the same special benefits. *Stoughton State Bank v. Stoughton,* 330

Injury from defect in sidewalk: Notice: Sufficiency.

2. Since the amendment of sec. 1339, Stats., by ch. 85, Laws of 1893, the notice of an injury claimed to have been sustained by reason of a defect in a sidewalk is not rendered insufficient or invalid by failure to describe correctly the defect, if there was no intention to mislead the municipality and it was not in fact misled. *Steinke v. Oshkosh,* 124

3. Where such a notice described the defect as an incline in the walk, made of old and worn planks laid lengthwise so as to be slippery and unsafe to pedestrians, and both the notice and the complaint stated that plaintiff slipped on such incline and fell, but at the trial plaintiff testified that her injury was caused by stepping into a hole in the walk at the place described, and further testified that it was due to her lack of familiarity with the English language that she did not make her attorneys understand that she stepped into a hole, it was a question for the jury whether in giving the notice there was any intention to mislead the city; and upon evidence tending to show that the city was seasonably advised of the existence of the hole it was for the jury to say whether or not the city was misled. *Ibid.*

Same: Death: Sufficiency of railing: Proximate cause.

4. In an action for death of a person who fell from a sidewalk where it crossed a ravine and who had stated, after the accident, that he was going to sit down and he fell over and that was the last he knew, the evidence is *held* insufficient to show that alleged defects in the railing along the walk were the proximate cause of the injury. *Carlson v. Washburn,* 619

5. If the railing along the sidewalk where it crossed a ravine was reasonably safe and sufficient to protect persons traveling on the walk, the city is not liable for an injury to a person who fell into the ravine when he attempted to sit upon the railing. *Ibid.*

Same: Itemizing claim: Effect: Damages.

6. Whether the itemizing of damages in a claim filed against a city for a personal injury, and in the complaint filed in the circuit court on appeal, has the effect to limit the amount recoverable for any one element of damage to the sum specified therefor in the itemized claim, not decided. *Hutchinson v. Oshkosh,* 141

7. Even if the itemizing of the claim has such effect, the element of mental suffering or chagrin on account of a deformity resulting from the injury is not included in a specified item of damages by reason of inability to carry on plaintiff's business; and for such element a substantial sum may in a proper case be allowed. *Ibid.*

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8. For damages by reason of the inability of plaintiff (a married woman forty years old) to carry on her established dressmaking business from which her net earnings had been about $1 per day, because of a permanent injury and impairment of her right leg resulting from a fall on a defective sidewalk, and for the element of mental suffering or chagrin on account of deformity and disfigurement resulting from the injury, an award of $4,000 in this case is *held* not excessive. *Ibid.*

MURDER. See HOMICIDE, 5.

MUTUAL BENEFIT SOCIETIES. See INSURANCE, 5–9.

MUTUALITY of contract. See SPECIFIC PERFORMANCE, 5–7.

NEGLIGENCE.

See AUTOMOBILES, 1. CARRIERS. INSTRUCTIONS TO JURY, 8. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 1–5. RAILROADS, 6–21. STREET RAILWAYS.

Ponds on private grounds: Danger to children: Duty to fence.

1. As to trespassers, useful or lawful structures or objects upon one's own land may, in the absence of active negligence at the time of the injury, be maintained and used in the customary manner in which they have been in the past, provided such maintenance and use is not so obviously dangerous as to partake of the nature of gross negligence. *Emond v. Kimberly-Clark Co.* 83

2. In the absence of special danger or peculiar circumstances there is no breach of duty to the public in leaving unfenced a pond of water located on private property; and the attractiveness of the water or its nearness to a public highway does not take it out of the rule unless it is so located as to endanger the safety of children or other persons using the highway. *Ibid.*

3. So *held* as to an artificial pond, one end of which adjoined a highway while from the other end, about forty feet away, the water flowed over a gate in a dam in a way alleged to have been peculiarly attractive to children,—the action being for death of a child who fell from the dam and was drowned. *Ibid.*

Exhibiting machinery at fair: Injury to spectator: Lack of guard rail: Concurring negligence of third person.

4. In an action for injury to plaintiff whose arm was caught between a belt and pulley on a threshing machine exhibited by defendant at a county fair, the evidence is *held* sufficient to warrant the jury in finding that at the time of the accident plaintiff was descending the steps of a viewing platform near the machine, which steps, unlike the platform itself, were not provided with a railing, and that the absence of a suitable railing was the proximate cause of the injury. *Pennell v. Rumely P. Co.* 195

5. If the defendant, exhibiting such machinery in operation, should reasonably have anticipated that injury might probably result to some person exercising ordinary care if guard rails were not provided for the steps of the viewing platform, it was negligent in failing to provide them, and is liable to a person who, without fault on his part, was injured by reason of the lack of such rails. *Ibid.*

6. If, as the testimony tended to show, another spectator jostled the plaintiff as he was descending the steps, causing him to fall toward the machine and get his arm caught therein, the fact that

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negligence of such third person concurred with defendant's negligence to produce the injury would not relieve the defendant of liability; nor can defendant escape liability if the act of the third person was not a negligent one. *Ibid.*

7. A reference by the trial judge in his charge in such case to the "viewing stand which caused the injury," did not take from the jury the question of proximate cause, and, in the light of the remainder of the charge, the jury could not so have understood it. The error, if any, was therefore not prejudicial. *Ibid.*

Fire set by traction engine: Sufficiency of spark arrester.

8. In an action to recover for the burning of a barn and other property the evidence is *held* to sustain a finding by the jury that the fire was caused by sparks or cinders emitted from defendants' traction engine. *Legro v. Carley,* 534

9. Sub. 1, sec. 1494—57, Stats., includes within its requirements all traction or portable engines, and it was error to exclude evidence offered by plaintiff to show that defendants were running the engine in question in violation of that statute. *Ibid.*

10. The requirements of sub. 1, sec. 1494—57, Stats., that the engines mentioned therein shall be "so constructed as to give the most practicable protection against the escape of sparks" and "shall be provided with the most practicable devices to prevent the escape of fire from ash pans or fire boxes," do not render the statute void for uncertainty. *Ibid.*

11. The spark arrester upon the engine in question, not being a screen or wire netting on top of the smokestack, but being in the form of a cone of wire screen with a rim on top, set down on the top of the smokestack with the point or apex downward into the stack, and the point having been rusted or burned off so that there was a hole in it, was not in compliance with said statute. *Ibid.*

12. An instruction to the jury, to the effect that there was a large amount of testimony tending to show that the spark arrester was not unsafe or defective, and little if any evidence that it was defective or unsafe, was erroneous and prejudicial. *Ibid.*

Collision between motorcycle and vehicle.

13. In an action for injuries sustained in a collision between plaintiff's motorcycle and defendant's vehicle, a finding of the circuit court acquitting defendant of negligence is *held* not to be against the preponderance of the evidence. *Liebman v. Welsh,* 597

Proximate cause of injury. See CARRIERS, 21, 22. MUNICIPAL CORPORATIONS, 4. NEGLIGENCE, 4, 5, 7.

Contributory negligence. See AUTOMOBILES, 1. MASTER AND SERVANT, 1, 2, 5–7. RAILROADS, 10–13. STREET RAILWAYS, 1–3.

Concurrent negligence. See NEGLIGENCE, 6.

NEWSPAPERS. See LIBEL AND SLANDER.

NEW TRIAL.

See APPEAL, 4, 8. AUTOMOBILES, 2.

A motion for a new trial on the ground of newly discovered evidence that the assured had a rupture, contrary to a warranty in his application for the policy—such fact to be proved by the testimony of his mistress,—is *held* to have been properly denied,

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both because defendant had not used diligence to discover such evidence or defense and because, two juries having rejected the testimony of the woman as unworthy of belief, there was little likelihood that her testimony would make any change in the result on another trial. *Andrews v. United States C. Co.* 604

NONRESIDENTS. See ACTION, 1, 2. DOWER.

NONSUIT. See RAILROADS, 9.

NOTICE.
Of acceptance. See GUARANTY, 5–7.
Of default. See GUARANTY, 7.
Of meeting. See CORPORATIONS, 8. RELIGIOUS SOCIETIES.
Of injury. See LIMITATION OF ACTIONS, 1. MUNICIPAL CORPORATIONS, 2, 3. RELEASE.
Of title. See SALES, 1.

NUISANCES. See NEGLIGENCE, 1–3. RAILROADS, 7.

OFFICERS.

Constitutional officers: When to take office. See ELECTIONS, 1.

State officers. See CONSTITUTIONAL LAW, 14.

County officers: Powers. See COUNTIES.

Election officers: Powers and duties. See ELECTIONS.

Title to office. See QUO WARRANTO.

Eligibility. See OFFICERS, 6.

Term of office. See SCHOOLS AND SCHOOL DISTRICTS, 1.

Compensation: Income tax on salaries. See CONSTITUTIONAL LAW, 11–14.

Removal: Town officers. See CERTIORARI.

Same: Duties under unconstitutional statute: Authority of circuit judge.

1. An unconstitutional law imposes no enforceable legal duty upon a public officer, but the duties of the officer remain defined by existing valid laws and as if such unconstitutional law had never been enacted. Refusal to obey such a law is therefore not ground for the removal of an officer. So *held* as to the "force clause" in ch. 337, Laws of 1911 (sub. 3, sec. 1317*m*—4, Stats. 1911), relating to improvement of highways. *State ex rel. Ballard v. Goodland.* 393
2. Where the power to remove officers is conferred upon an administrative tribunal which, either expressly or by fair implication, is empowered to hear evidence and determine the existence of facts which are cause for such removal, the proceeding is *quasi*-judicial and due process of law is required. *Ibid.*
3. By sec. 976, Stats., the power to remove town officers is conferred upon the circuit judge, not as a court, but as an administrative officer, and such power is to be exercised by *quasi*-judicial action. *Ibid.*

Same: Order as evidence: Eligibility to office: "Being a defaulter."

4. An order made by a circuit judge pursuant to sec. 976, Stats., removing a town officer for wilful and corrupt official misconduct, is proof in a later civil action of the fact of removal but is not evidence of the facts upon which the order was based. *State ex rel. Shea v. Evenson,* 623

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5. In an action to try the title to the office of town chairman the fact that there had been a defalcation by defendant when he held the office of town treasurer is *held* to be established by the evidence. *Ibid.*

6. In sec. 3, art. XIII, Const., providing that "no person being a defaulter . . . to this state or to any county or town therein . . . shall be eligible to any office of trust, profit or honor in this state," the words "being a defaulter" refer to persons presently in default and not to one who has made good his defalcation. *Ibid.*

Same: Police and fire commission: Powers.

7. In a proceeding under sec. 959—45, Stats. 1913, for removal of a member of the police or fire department in a city of the second or third class, the board of police and fire commissioners can act only upon written charges filed by the chief of the department or by an elector of the city. *State ex rel. Wendling v. Board of P. & F. Comm'rs,* 295

8. Where an administrative tribunal of limited jurisdiction is by a fair construction of the statute giving it authority required to act upon written charges made by designated persons, action in the absence of such charges is without jurisdiction and void. *Ibid.*

9. Suspension is an *ad interim* stoppage or arrest of official power and pay. Removal terminates wholly the incumbency of the office or employment. *Ibid.*

OPINION EVIDENCE. See WILLS, 2.

OPTIONS. See CONTRACTS, 2, 3.

PARENT AND CHILD. See SEDUCTION.

PAROL EVIDENCE. See EVIDENCE, 3. HUSBAND AND WIFE, 8. SPECIFIC PERFORMANCE, 1, 2.

PARTIES. See ACTION, 1–4. CARRIERS, 4. EJECTMENT.

PARTNERSHIP.

Construction of agreement: Good will as an asset: Accounting: Evidence of disbursements.

1. Under a copartnership agreement reciting that defendant was engaged in soliciting insurance and adjusting claims and that he was conducting such business in connection with the firm of A. & Son, general insurance agents, and providing that in consideration of certain payments to be made by plaintiff defendant assigned to him a one-third interest in said business and in the net income thereof, the partnership to continue for five years, the transfer to plaintiff did not include any element of value in the nature of good will; and at the termination of the partnership plaintiff was not entitled to recover from defendant any amount for good will as an asset of the business. *Hirschberg v. Bacher,* 207

2. Such partnership agreement provided that defendant should be "the head and manager of the business," and that all questions concerning the business should, in case of disagreement, be settled and determined by him; also that the books should be closed on January 1st in each year and the profits, if any, be then divided. The account of the income and disbursements of the business was kept in the books of A. & Son, entries of expense therein

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being made as given to the bookkeeper by defendant. He also gave plaintiff monthly statements of the earnings, to which plaintiff made no objection until the termination of the partnership. *Held*, that the books of account and the monthly statements were competent and established *prima facie* the items involved in the accounting between the partners. *Ibid.*

PASSENGERS. See STREET RAILWAYS.

PERMIT for employment of minor. See INSURANCE, 11, 12.

PERSONAL INJURIES. See INSTRUCTIONS TO JURY, 8. LIMITATION OF ACTIONS, 1. MASTER AND SERVANT. NEGLIGENCE. RAILROADS, 10–21. RELEASE. STREET RAILWAYS.

PHOTOGRAPHS. See EVIDENCE, 1.

PHYSICIANS AND SURGEONS. See WILLS, 2.

PLEADING.

Complaint. See ESTOPPEL, 3, 4. QUO WARRANTO.

1. To allege in a complaint that a thing is unsafe without specifying how or why it is unsafe, is to state a mere conclusion and is not sufficient. *Emond v. Kimberly-Clark Co.* 83

Answer. See ACTION, 1. INSURANCE, 2.

2. An answer setting up a claim for recoupment of damages by reason of a breach of warranty of goods sold, is sufficient to raise the question of defendant's right to such damages, even though judgment therefor is not formally demanded by way of counterclaim. *Jones v. Keefe,* 584

Counterclaim. See PLEADING, 2. SALES, 4.

Demurrer. See PLEADING, 1. QUO WARRANTO.

POLICE AND FIRE COMMISSION. See OFFICERS, 7.

POLITICAL YEAR. See ELECTIONS, 1.

PONDS. See NEGLIGENCE, 2, 3.

POOR PERSONS. See TOWNS, 13.

POPULATION. See TOWNS, 1–3.

POSSESSION. See ADVERSE POSSESSION. EJECTMENT, 1. LANDLORD AND TENANT, 3–7. MORTGAGES, 3, 4. REPLEVIN.

PREFERENCES. See MORTGAGES, 1.

PRESUMPTIONS. See CARRIERS, 12, 17. COMPROMISE AND SETTLEMENT, 2. CONSTITUTIONAL LAW, 8. HUSBAND AND WIFE, 10, 12, 15. INSURANCE, 12. MORTGAGES, 3. RAILROADS, 7. SCHOOLS AND SCHOOL DISTRICTS, 3. WORKMEN'S COMPENSATION ACT.

PRINCIPAL AND AGENT. See BROKERS.

PRINCIPAL AND SURETY. See BILLS AND NOTES, 3, 4. GUARANTY, 9, 10.

PRIORITY. See MORTGAGES, 1.

PRIVILEGE. See LIBEL AND SLANDER, 9.

PROCESS.

An order for publication of the summons in a divorce action, directing it to be published "for not less than once a week for six weeks," fixes the period of publication at six weeks, and is a sufficient compliance with sec. 2640, Stats. *Bibelhausen v. Bibelhausen,* 365

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PROMISSORY NOTES. See BILLS AND NOTES.

PROXIMATE CAUSE. See CARRIERS, 21, 22. MUNICIPAL CORPORATIONS, 4. NEGLIGENCE, 4, 5, 7.

PUBLICATION: Service by. See PROCESS.

PUBLIC POLICY. See HUSBAND AND WIFE, 1, 16.

PUBLIC UTILITIES. See RAILROADS, 1–5.

PUNITORY DAMAGES. See DAMAGES, 5, 8.

QUITCLAIM DEED. See ADVERSE POSSESSION, 2, 3.

QUO WARRANTO.

In a complaint in an action of *quo warranto* challenging defendant's title to the office of clerk of a school district, an allegation that the electors of the district cast 602 votes, of which defendant received 301, must upon demurrer be construed as equivalent to an allegation that 602 *legal* votes were cast and that the defendant received 301 *legal* votes; and, a majority of the votes cast being required to elect, such allegation also sufficiently shows, as required by sec. 3468, Stats. 1913, in what respect defendant's election was illegally declared. *State ex rel. Schroeder v. Feuerstein*, 356

RAILROADS.

Regulation of rates: Prior special contracts superseded: Impairing obligation.

1. Under the Railroad Commission Law (ch. 362, Laws of 1905; secs. 1797—1 to 1797—36, Stats.) railroad rates within the state must be reasonable, just, and nondiscriminating, and apply to all shippers alike within the territory and for the commodity covered by the tariff rates. *Minneapolis, St. P. & S. S. M. R. Co. v. Menasha W. W. Co.* 130
2. The power to regulate the compensation to be paid for their services, granted to railroad companies by sub. 9, sec. 1828, Stats. 1898, was subject to the right of the state to amend or annul it; and all contracts made pursuant thereto by railroad companies were subject to be superseded whenever the state should resume the exercise of its sovereign power to regulate rates. *Ibid.*
3. When, therefore, pursuant to the Railroad Commission Law, a railway company filed its tariffs covering rates for the transportation of freight as to which a special contract then existed, such contract became inoperative. *Ibid.*
4. In so far as there is language in the opinion in *Superior v. Douglas Co. T. Co.* 141 Wis. 363, to the effect that a contract for a public utility rate made prior to the passage of the Public Utility Law would be saved by the constitutional prohibition against laws impairing the obligation of contracts, irrespective of sec. 1797*m*—91, Stats., it is disapproved. *Ibid.*
5. That part of sec. 1797—6, Stats., providing that nothing in the Railroad Commission Act shall be construed to prevent "transit and other special contract rates," refers to rates to be made thereafter under the supervision and regulation of the commission and complying with the requirements of that section, and does not relate to special contracts existing at the time the law took effect. *Ibid.*

Taxation. See CONSTITUTIONAL LAW, 15. TAXATION, 2–5.

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Obstruction of stream: Flooding lands: Remedies: Limitation of actions: Recurrent nuisance: Railway company as lessee.

6. Where, by reason of the faulty construction and maintenance of a railroad, a stream crossed thereby is so dammed up as to flow back upon and injure the adjoining land, the remedy of the landowner is not limited by sec. 1836, Stats., to a proceeding for condemnation; nor, where none of the land so flooded has been taken or used for right-of-way purposes, is sec. 1852, Stats., relating to condemnation, applicable to the situation. *Verbeck v. Minneapolis, St. P. & S. S. M. R. Co.* 51

7. The landowner's right of action in such case does not arise from the lawful construction of the railroad where located, but from the failure to restore the stream to its former state or keep its usefulness unimpaired when the railroad was constructed and afterwards; and an action by him for damages by reason of a recurrent nuisance occasioned by such improper construction and maintenance of the railroad is not barred at the expiration of six years from the time of such construction. *Kuhl v. C. & N. W. R. Co.* 101 Wis. 42, distinguished. *Ibid.*

8. Evidence in such an action that defendant had operated the railroad since April, 1909; that it maintained station agents and section crews that repaired the track; that complaints were frequently made to it about the flooding; that it made no objection on the ground that it was not the party liable; and that in 1912 it remedied the trouble by putting in a culvert which took care of the water, shows a *prima facie* liability on the part of the defendant, though a mere lessee, for the damages accruing since the date first named, when it took possession of the road. *Ibid.*

9. Evidence in such action that eight or nine acres of plaintiff's land were rendered untillable by reason of the flooding and that the rental value per acre in ten-acre lots was $10 to $12, was sufficient to show substantial damage, and a nonsuit was improper. *Ibid.*

Operation. See CARRIERS.

Injuries to licensees or trespassers on trains.

10. Plaintiff's intestate, a boy sixteen years old, who had been riding in a dangerous position between two box cars drawn by a switch engine on a switch track, jumped or fell therefrom and was killed. There being no evidence sufficient to warrant the jury in finding that there was any negligence in operating the train or defect in the track which caused the injury, or that the boy was thrown or jarred from the train thereby, and it appearing from the undisputed evidence that he was himself negligent, a verdict for defendant was properly directed. *Jacob v. Chicago & N. W. R. Co.* 349

[11. Whether a railway company owes any duty to a mere licensee or discovered trespasser riding on its train, to keep its track in repair or observe statutory limitations as to speed within city limits, not decided.] *Ibid.*

Injury to employee: Assumption of risk: Contributory negligence: Evidence: Credibility.

12. In sec. 1816, Stats. 1911 (Laws of 1907, ch. 254), the term "contributory negligence" was used as including assumption of risk; and the defense of assumption of risk was not abolished by that statute. *Cox v. Chicago, M. & St. P. R. Co.* 491

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13. In an action against a railway company under said statute for injuries to an employee, the jury found the plaintiff guilty of contributory negligence under a charge which required them to include assumption of risk as part of such negligence, and also found that such negligence was less as a contributing cause of the accident than the negligence of the defendant, thus finding the existence of all the conditions which entitled plaintiff to recover. *Held*, that a further separate finding of assumption of risk was merely a finding of one of the elements of the contributory negligence which they had already found, and did not affect the right of recovery. *Ibid.*

14. Where plaintiff, a railway employee, was injured by being caught between the side of a tender and a stationary wooden structure standing so near the track that the clearance between it and the tender was only about seven inches, the fact that he could not give an exact or accurate account of just what happened at the time or just how his body was handled, did not render his version of the accident incredible. *Ibid.*

Same: Interstate service: When federal statute governs: Election: Waiver: Assumption of risk.

15. Where the facts are undisputed the question whether a particular service or engagement therein is of interstate character is one of law; but when material facts bearing on that question are in dispute they may properly be determined by the jury, leaving to the court the legal conclusion to be drawn therefrom. *Graber v. Duluth, S. S. & A. R. Co.* 414

16. A railway employee, while actually performing a service essential to or so closely connected with the business of interstate commerce as to be substantially a part of it, though not necessarily exclusive of all *intrastate* features, is employed in interstate commerce within the meaning of the federal Employers' Liability Act. *Ibid.*

17. If the particular service in progress at the time of the injury, in any substantial part, is within the interstate field, then the federal law rules the case if either party so elects; but this is a right which may be waived, expressly or impliedly. *Ibid.*

18. Any brief incidental absence from the scene of work or the instrumentality used therein, which is not inconsistent with the employee's duty to his employer, such as customarily visiting a wayside place for lunch or other common means of refreshment, or waiting after one task is done for orders as to the next movement, does not preclude the employee from claiming to be still on duty and engaged in interstate commerce. *Ibid.*

19. Where upon the evidence the trial court might properly have found, as matter of law, that plaintiff was engaged in interstate business when injured, its submission of the question to the jury is not an error of which defendant can complain. *Ibid.*

20. Where, in an action for injuries to a railway employee, neither party claimed the benefit of the federal Employers' Liability Act, there was no error in refusing to compel plaintiff to elect whether he would claim under the federal or the state law; and where the court applied the federal law, which was more beneficial to the defendant than the state law, the defendant has no ground for complaint. *Ibid.*

21. The defense of assumption of risk, available under the federal Employers' Liability Act, applies only to such risks as the em-

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ployee expressly or impliedly contracts to take upon himself because of being ordinary incidents of the business as customarily carried on, or as carried on in the particular case to his knowledge or under such circumstances that reasonable attention to his situation would afford him such knowledge. It does not include risk of unexpected negligent acts of co-employees. *Ibid.*

RAPE.

Consent: "Utmost resistance."

1. To constitute rape there must be an entire absence of consent, and there must be the utmost resistance by the woman by all means within her power. *McLain v. State,* 204
2. "Utmost resistance" is a relative term; and what would constitute such resistance on the part of a weak, nervous, and timid person might be the veriest sham on the part of a healthy, robust, and courageous person. *Ibid.*
3. The evidence in this case as to nonconsent and resistance is *held* sufficient to sustain a conviction of rape. *Ibid.*

Assault with intent to commit rape.

4. A person is not guilty of an assault with intent to commit rape unless, at the time he made the assault or at some time during its continuance, he purposed violating the woman forcibly and against her will. If he so purposed, it matters not that fear of detection and the consequences of his act, or the manner and degree of resistance, caused him to desist. *Skulhus v. State,* 475
5. A purpose to overcome resistance is essential to the offense, but if the woman does not at any time consent it is not essential that she resist unto death, or continue her physical resistance in face of reasonably supposed imminent peril of great bodily harm, or controlling terror. *Ibid.*
6. Although in this case the accused desisted from the assault as soon as outcry was made, a verdict finding him guilty of an assault with intent to commit rape was warranted by the evidence. *Ibid.*

RATES. See RAILROADS, 1–5.

RATIFICATION. See RELIGIOUS SOCIETIES, 2. TOWNS, 16.

REAL PARTY IN INTEREST. See EJECTMENT, 3.

REAL PROPERTY. See ADVERSE POSSESSION. BROKERS. CONTRACTS, 1. CORPORATIONS, 9. COUNTIES, 3–7. DOWER. EJECTMENT. HIGHWAYS. HOMESTEAD. HUSBAND AND WIFE. LANDLORD AND TENANT. MORTGAGES. REFORMATION OF INSTRUMENTS. RELIGIOUS SOCIETIES, 2. SPECIFIC PERFORMANCE. VENDOR AND PURCHASER.

REASSESSMENT. See TAXATION, 15, 16.

RECOUPMENT. See PLEADING, 2.

REFORMATION OF INSTRUMENTS.

See CORPORATIONS, 2–5.

1. A court of equity will not reform a written instrument for a mistake in reducing it to writing unless such mistake is established by the most clear and satisfactory evidence. *Govier v. Brechler,* 157
2. The evidence in this case is *held* insufficient to warrant the reformation of a contract for the sale of land so that it should provide

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that the land to be taken by the vendor in part payment was to be "close to a railroad *right of way*," instead of "close to a railroad." *Ibid.*

RELEASE.

See COMPROMISE AND SETTLEMENT, 3. CONTRACTS, 1. GUARANTY, 8. HUSBAND AND WIFE, 12, 13, 16. LIMITATION OF ACTIONS, 1.

Payment of money by an employer to an injured employee, whereupon the latter executed a release of all claims for damages on account of the injury, did not operate as a waiver of notice of the injury or estop the employer from asserting that no notice had been served, in a subsequent action by the employee to recover damages for such injury. *Staszczuk v. Gilman Mfg. Co.* 615

RELIGIOUS SOCIETIES.

Factional division: Rights of majority: Sale of property.

1. The constitution of a religious corporation provided, in effect, that in case of a division of the membership the majority should be considered the proper congregation and should keep the property. It also provided that meetings of the congregation should be called by the minister. After a division had occurred the minister, who was of the minority faction, refused to call a meeting. *Held*, that those composing the majority faction were the only members of the congregation entitled to a voice in administering its affairs; that under the circumstances the requirement in the constitution as to notice was inoperative; that no one of the minority was entitled to notice; and that the majority had the right, upon reasonable notice, to meet and act or, if all were present, to act without previous notice. *Lutheran T. Cong. v. St. Paul's Eng. E. L. Cong.* 56

2. A sale of the church property, therefore, which was in good faith authorized and afterwards ratified at meetings attended only by those of the majority faction, but of which meetings all of both factions had actual notice, was valid and binding upon the congregation. *Ibid.*

REMARKS OF COUNSEL. See TRIAL, 1.

REMOVAL OF OFFICERS. See OFFICERS.

REPAIRS. See LANDLORD AND TENANT, 3.

REPEAL OF STATUTES. See STATUTES, 1, 2.

REPLEVIN.

See DAMAGES, 1.

An action of replevin in the Milwaukee civil court being governed by the rules and statutes applicable to such actions in justices' courts, where the chattel in suit has been seized by the sheriff under the writ, if the plaintiff fails to recover there should not be a judgment for defendant in the alternative for a return of the chattel or for its value, but there should be, under sec. 3743, Stats., an order for its return to defendant and judgment for damages only. The chattel is, in such a case, in the custody of the court even though, by arrangement between the sheriff and the plaintiff, it has been turned over to the latter. *Pfeifer v. Layton Park Oil & Soap Co.* 1

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REPUTATION. See CONSTITUTIONAL LAW, 17. LIBEL AND SLANDER.

REQUESTS FOR INSTRUCTIONS. See INSTRUCTIONS TO JURY, 2.

RESCISSION. See SALES, 1, 2.

RESIDENCE. See ACTION, 1, 2. DOWER.

RES JUDICATA. See TOWNS, 4, 5.

RETRACTION. See LIBEL AND SLANDER, 11.

RETROACTIVE STATUTES. See STATUTES, 2.

REVIVAL of action. See EJECTMENT, 2, 3.

RULES AND REGULATIONS. See MASTER AND SERVANT, 2.

RULES OF COURT. See APPEAL, 10.

SALARIES. See CONSTITUTIONAL LAW, 11–14.

SALES.

Exchange of chattel for land: Failure of title: Rescission.

1. One who traded a horse for a specified quantity of gravel to be taken from certain land to which, as the record showed, the other party had no title, had constructive notice of such lack of title and could not afterwards rescind the trade on that ground. *Pfeifer v. Layton Park Oil & Soap Co.* 1

2. Nor, having already taken a part of the gravel, could he rescind without offering to return the gravel or its value either to the other party to the trade or to whoever was entitled thereto. *Ibid.*

Warranty: Breach: Recoupment. See PLEADING, 2.

Same: Replacing defective part in automobile: Failure to return old part: Stipulated damages: Counterclaim.

3. In accordance with a custom of dealing between an automobile manufacturer and a dealer, understood and consented to by the latter, the manufacturer, upon shipping to the dealer a new motor as an exchange of parts pursuant to a warranty, charged up to the dealer the agent's price of the new motor pending the return of the old one, and sent a bill accordingly. A corresponding credit was to be given for the old motor when returned as agreed. *Held*, that there was no purchase and sale of the new motor, but the price so charged for it must be regarded as stipulated damages in case of a failure to return the old one. *Studebaker Corporation v. Gollmar*, 336

4. A counterclaim by the dealer in such case, alleging that the old motor was defective through fault of the manufacturer and that at its special instance and request the dealer had rendered services upon such machine, stating the reasonable value of such services, is a good counterclaim. *Ibid.*

Same: Breach.

5. In an action upon a note given for the purchase price of an automobile which was "guaranteed" by the vendors for one year, the trial court properly held, as matter of law, that the evidence did not tend to show any breach of the warranty by neglect or refusal of the vendors to make such repairs as were required thereby. *Jones v. Keefe*, 584

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SCHOOLS AND SCHOOL DISTRICTS.

Officers: Election. See QUO WARRANTO.

Same: Term of office.

1. Under sec. 431, Stats. 1913, providing that school district officers shall hold office for "three years and until their successors have been elected or appointed, but not beyond ten days beyond the expiration of their term of office without again being elected or appointed," the term of office of a school district clerk does not expire until his successor is elected or appointed, and he may hold for a period of ten days thereafter if his successor does not qualify within that time. *State ex rel. Schroeder v. Feuerstein,* 356

Powers of school boards: Discharge of teacher: Instructions to jury.

2. Under sec. 441, Stats., a school board may discharge a teacher who has failed to perform his duties under his contract. *Curkeet v. Joint School District,* 149

3. In an action by a teacher against a school district to recover damages for a wrongful discharge, the court instructed the jury: "As a general rule a teacher may be removed or dismissed before the expiration of his term of service for any cause that renders him unfit to be a teacher in the public schools so that the best interests of the school require that he should be removed or dismissed, as for incompetency in teaching, failing to manage and control the school, or failing in any respect to perform his obligations as a teacher, from which arises disorganization in the school work. You are to determine in this case whether the discharge of the plaintiff by the school board was justified." *Held,* that the instruction was not open to the objection that it left it to the jury to say what constituted good cause for discharging plaintiff, nor the objection that under it the jury might assume that the school board was justified in dismissing plaintiff for any reason it considered sufficient, regardless of the evidence. It must be presumed that the jury proceeded under the rules of law given them and the facts in evidence. *Ibid.*

Same: Use of buildings for private purposes.

4. The school board in a city of the first class has no authority, either under sec. 8, ch. 459, Laws of 1907, or under sec. 435*e*, Stats., to permit school principals to use the school buildings for the purpose of conducting private school-book and supply businesses for their personal profit; and such use of the buildings may be restrained in a taxpayer's action. *Tyre v. Krug,* 39

School funds. See CONSTITUTIONAL LAW, 2.

SEDUCTION.

1. In an action by a father for loss of his daughter's services by reason of her seduction which resulted in the birth of an illegitimate child, a verdict for plaintiff is *held* to be supported by sufficient evidence, although the question is a close one, turning upon the veracity of the daughter and of the defendant. *Trzebietowski v. Jereski,* 190

2. To a question as to how the birth of the illegitimate child affected him, plaintiff answered "It affected me so that I would rather see the girl was dead or me." *Held,* that the question was proper and the answer responsive. *Ibid.*

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3. Defendant having, for the purpose of showing previous unchastity of plaintiff's daughter, introduced testimony to the effect that while riding in a farm wagon, when about fourteen years old, she had thrust her hand through an opening in the seat and playfully tickled the driver on his side, the court properly directed the jury to disregard such testimony, there being nothing in the incident indicating depravity. *Ibid.*

SET-GUNS. See HOMICIDE, 1, 2, 5.

SETTLEMENT. See COMPROMISE AND SETTLEMENT.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 2–5.

SLANDER. See CONSTITUTIONAL LAW, 16–18. LIBEL AND SLANDER.

SPARK ARRESTERS. See NEGLIGENCE, 8–12.

SPECIAL ASSESSMENTS. See MUNICIPAL CORPORATIONS, 1.

SPECIAL VERDICT. See FRAUD, 5, 6. STREET RAILWAYS, 2. TRIAL, 8–11.

SPECIFIC PERFORMANCE.

Contract to convey land: Latent ambiguity: Parol evidence: Mistake.

1. The owner of an eighty-acre tract of land platted a part of it as an addition to a village, such addition consisting of four blocks of eight lots each. After nine of the lots had been sold and conveyed by him or by his heirs, the heirs made a contract to sell the eighty-acre tract, "less four village lots, which lots are an addition to the village." In an action to compel specific performance of that contract, it is *held* that the words above quoted created a latent ambiguity and that parol evidence was proper to show the situation of the parties to the contract, the state of the property, and the location of the addition. *Morrow v. Townsend,* 154

2. Such evidence, with certain further evidence, is *held* to sustain a finding of the trial court that the parties to the contract intended to exclude therefrom the four blocks, and not merely four lots. *Ibid.*

3. Specific performance of the contract as written could not be enforced, since it could not be determined which four lots were meant. *Ibid.*

Same: Evidence: Definiteness of contract: Mutuality: Partial performance: Abandonment: Laches.

4. In an action to compel specific performance of an agreement to convey land, the evidence is *held* sufficient to sustain findings to the effect that in 1900 defendant orally agreed to furnish the money to buy in his own name a farm for plaintiff, his son-in-law, that plaintiff could have all the time he required to pay defendant the purchase price, and that when he had made some substantial payment the title should be transferred to him; that in pursuance of such agreement a farm was purchased for $6,000, and plaintiff went into possession and occupied it for ten years, exercising all rights of ownership, paying taxes and making extensive and valuable improvements; and that plaintiff had paid to defendant on the purchase price sums aggregating more than $3,000. *Dingman v. Hilberry,* 170

5. Liberally construed, such contract meets all requirements for the enforcement of specific performance, being definite, mutual,

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founded upon valuable consideration, free from fraud or mistake, and reasonable in its scope and purpose. *Ibid.*

6. Although the times of payment and time of conveyance were not fixed absolutely, yet the provision that plaintiff should have such time as he required to pay for the farm meant that he should pay as he was able, and his ability to pay, as well as what would constitute a substantial payment which would entitle him to a deed, were facts which could be ascertained with sufficient certainty. *Ibid.*

7. While the general rule is that the mutuality of a contract will be determined as of the time it was entered into, there are many exceptions. Conditional contracts, such as options to purchase land, that become binding only upon the happening of an event or the exercise of the choice granted, may be specifically enforced upon the happening of the event or the exercise of the option within the prescribed time, a mutuality of remedies when the case is ripe for a decree being sufficient. *Ibid.*

8. In this case the partial and substantial performance of the contract by plaintiff, with his offer to complete performance, *would seem*, also, to be equivalent to an obligation on his part to perform. *Ibid.*

9. The facts that after ten years' occupancy plaintiff temporarily left the farm upon defendant's request, to aid defendant in settling a domestic difficulty with his wife, and that, upon further payments being refused by defendant, he delayed bringing an action because defendant said he was going to deed the land to his daughter (plaintiff's wife) without further payments, did not show an abandonment of the contract by plaintiff or such laches on his part as to defeat the action. *Ibid.*

10. A decree for specific performance in such case, by which defendant received the price paid by him for the farm, with interest, was not inequitable although the land had, largely through plaintiff's labor, greatly increased in value, the plaintiff being entitled to the benefit of his purchase upon complying with its terms. *Ibid.*

STATE EXPENSES. See TAXATION, 16.

STATE OFFICERS. See CONSTITUTIONAL LAW, 14.

STATES.

Insurance of state property.

Under secs. 1978*a* to 1978*c*, Stats. 1913, providing for state insurance of public property and establishing a state insurance fund, such property does not automatically become insured, but payments out of said fund are limited to losses of property which had been certified by the insurance commissioner to the state treasurer as insured, and to the amount of insurance thereon certified by said commissioner. *State ex rel. Board of Regents v. Ekern*, 319

STATUTES.

Constitutionality. See CONSTITUTIONAL LAW. OFFICERS, 1–3.

Mandatory or directory? See ELECTIONS, 11.

Amendment and repeal. See DIVORCE, 2, 3.

1. A later statute which amends a former statute to read as in the later statute indicated continues in force all the provisions of

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the former statute found in the later one. *Dallmann v. Dallmann,* 480

2. An amendatory statute will not be construed as retroactive or as applying to prior facts or transactions, or to pending proceedings, unless a contrary intention is expressly stated or necessarily implied. *Ibid.*

Construction. See ACTION, 5. ADVERSE POSSESSION, 1, 2. APPEAL, 3. ASSAULT AND BATTERY, 2. AUTOMOBILES, 1. CONSTITUTIONAL LAW, 3, 12, 16, 17, 20, 22. CORPORATIONS, 7, 10. DAMAGES, 4, 5. DIVORCE, 2–4. DOWER, 1. EJECTMENT, 3. ELECTIONS, 2, 5, 7–10, 12. HIGHWAYS. HOMESTEAD. HOMICIDE, 1–3, 5. HUSBAND AND WIFE, 5–7, 10. INSURANCE, 12. INTEREST. LANDLORD AND TENANT, 3. LIMITATION OF ACTIONS. MUNICIPAL CORPORATIONS, 1, 2. NEGLIGENCE, 9, 10. PROCESS. QUO WARRANTO. RAILROADS, 1–3, 5, 6, 8, 12, 20, 21. REPLEVIN. SCHOOLS AND SCHOOL DISTRICTS, 1, 2, 4. STATES. STATUTES, 2. TAXATION, 3, 5, 8, 10, 13–15. TOWNS, 1, 11. WILLS, 5, 6. WORKMEN'S COMPENSATION ACT, 1, 6, 7.

3. When a statute, giving its language its ordinary and natural meaning, expresses a result neither absurd nor harsh, but on the contrary one in harmony with the general scheme of the law, namely, that an income tax shall, substantially, become a substitute for a personal property tax, then such natural and ordinary meaning should be given to the language used, and there is no room for construction. *Van Dyke v. Milwaukee,* 460

4. A practically contemporaneous construction by an administrative department cannot be successfully invoked to override a plain meaning of the statute. *Ibid.*

For rules of construction see, especially, CONSTITUTIONAL LAW, 8.

STOCK AND STOCKHOLDERS. See CONTRACTS, 2. CORPORATIONS, 1, 4, 6–8. FRAUD, 7, 8. TAXATION, 1.

STREET RAILWAYS.

Injuries to passengers: Contributory negligence.

1. In an action for injuries sustained in attempting to board a street car, the evidence being ample to sustain the jury's finding that plaintiff was guilty of contributory negligence, the exclusion of evidence which, even if admissible, could have had only a remote and inconsequential bearing on that question, was not prejudicial error. *De Pas v. Southern Wis. R. Co.* 306

2. It was not improper in such case to submit in the special verdict a question as to whether plaintiff ought to have seen that the door of the car was closed before she attempted to board the car—its purpose being to ascertain whether or not she was a passenger when injured; and even if erroneous such submission was not prejudicial, since it could not have influenced the jury in answering the question as to contributory negligence. *Ibid.*

3. Upon evidence tending to show that when plaintiff, who was carrying a child upon one arm and a heavy package under the other, reached a point just inside the door of one of defendant's pay-as-you-enter street cars, she was required to deliver her fare; that as she was trying to get the money from her glove the conductor signaled for the car to start, and it started suddenly with a violent jerk, by reason whereof she fell backward on the platform and was injured; that no effort had been made to assist her; and that there were no handholds within her reach by which

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she could have guarded against being thrown down, the questions of negligence on the part of the defendant and contributory negligence on plaintiff's part were properly for the jury. *Hewitt v. Southern Wis. R. Co.* 309

4. The evidence in such case must be viewed in the light of the duty of the defendant to exercise the highest degree of care for the safety of passengers reasonably to be expected from human vigilance and foresight in view of the mode and character of the conveyance adopted, and consistent with the practical operation of the business. *Ibid.*

STREETS. See MUNICIPAL CORPORATIONS, 1–5.

SUBROGATION.

See TRIAL, 13.

One loaning money or credit to pay a debt of the borrower secured by a mortgage or otherwise, is not entitled to subrogation if there was no promise to give him security, even though he in good faith believed he was to receive security. *Stewart v. Stewart*, 90 Wis. 516, distinguished. *Murphy v. Baldwin*, 567

SUICIDE. See INSURANCE, 9, 10. WORKMEN'S COMPENSATION ACT, 8, 9.

SUMMONS. See PROCESS.

SUNDAY.

Although a telephone conversation between the parties on Sunday did not constitute a binding contract, letters which followed and confirmed such conversation and which were complete and specific in their terms constituted a valid written contract. *Webster Mfg. Co. v. Montreal River L. Co.* 456

SUSPENSION. See OFFICERS, 9.

TAXATION.

Constitutional requirements and restrictions. See CONSTITUTIONAL LAW, 11–15.

Bank stock: When taxable.

1. Where the capital stock of a banking corporation whose articles of incorporation had previously been filed was subscribed for, and, except as to a few shares, paid for and the certificates of stock issued prior to May 1, 1913, the stock was taxable in that year, although the certificate of the banking commissioner authorizing the corporation to commence the business of banking was not issued until May 12, 1913. *Farmers & M. Bank v. Richland Center*, 185

Railroad property: "Necessarily used in operating:" Terminal facilities: Docks. See CONSTITUTIONAL LAW, 15.

2. The property of a public-service corporation like a railway company, including its franchises, terminals, and real and personal property, reasonably necessary to be used and in fact used in the performance of its duties to the public, is an entirety and is not to be separated for the purpose of taxation. *Minneapolis, St. P. & S. S. M. R. Co. v. Douglas County*, 408

3. Terminal facilities, such as freight houses, grain elevators, and warehouses, owned by the carrier and equipped with the proper appliances necessary to enable it to perform its full duty of

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transportation and delivery of freight of all kinds, either to the consumer, the dealer, or a connecting carrier, constitute property "necessarily used in operating the railroad," within the meaning of sub. 3, sec. 1212, Stats. 1911, and are part of the entirety. The word "necessary," in this connection, means reasonably required in the exercise of sound business prudence. *Ibid.*

4. An ore dock and a merchandise dock owned and operated by a railway company exclusively for its own use in temporarily storing, handling, and delivering to lake carriers the ore and freight hauled by it over its lines, and in receiving from lake carriers, temporarily storing, and loading merchandise and freight destined for transportation over its railway lines, are necessarily used in operating the railroad and are terminal facilities, within the foregoing rule. *Ibid.*

5. The exception in sub. 3 of sec. 1212, Stats. 1911, viz. "grain elevators used in transferring grain between cars and vessels, coal docks, ore docks and merchandise docks," includes only those elevators and docks which are not a part of the railway property because not necessarily used by the railroad in the performance of its duties as a common carrier. *Ibid.*

Income tax: Salaries of public officers. See CONSTITUTIONAL LAW, 11–14.

Same: What is "income:" Dividends from mining stock: Depreciation: Deductions: Premiums on bonds.

6. The word "income" in the constitutional amendment authorizing the levying of an income tax and in the statute enacted in pursuance thereof is used in its common, ordinary meaning and not in its strict, technical, or true economic sense; and it includes ordinary dividends paid by going corporations, mining corporations as well as others. *Van Dyke v. Milwaukee,* 460

7. For purposes of income taxation such ordinary dividends will be conclusively presumed, as against stockholders, to be from earnings or profits. *Ibid.*

8. A stockholder cannot be permitted, under sub. (a), (b), sec. 1087*m*—4, Stats. 1911, to deduct from the dividends paid by a mining company, under the guise of "losses," the depreciation in the value of his stock caused by such distribution of dividends. *Ibid.*

9. Dividends declared and distributed during 1911 out of surplus on hand prior to January 1, 1911, when the Income Tax Law went into effect, are taxable as income of the year 1911, since the profits of a corporation become income to stockholders when distributed as dividends and not before. *Ibid.*

10. When only part of the income of a corporation is taxed in this state, a stockholder should be allowed, under sub. (c), sec. 1087*m*—4, Stats. 1911, a proportionate and not a total deduction of dividends, in computing the amount of his taxable income. *Ibid.*

11. The fact that a corporation disposed of its mining properties in exchange for stock in another corporation would not affect the taxable character of the dividends declared by it, after such exchange, out of surplus moneys or profits on hand. *Ibid.*

12. The fact that a person purchased bonds at a premium does not entitle him to deduct annually from the interest received a *pro*

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rata share of such premium in order that the capital may be kept unimpaired and that it may not be taxed as income. *Ibid.*

Same: Offset of personal property taxes.

13. Under sec. 1087*m*—26, Stats. 1911, one who paid a tax on his personal property for the year 1911 was entitled to have the amount so paid deducted from the tax on his income for that year. *Van Dyke v. Milwaukee,* 460

Appeal from board of review.

14. A county income tax assessor, if dissatisfied with the decision of the board of review of income assessments, has the right, under sec. 1087*m*—19, Stats., to appeal therefrom to the state tax commission. *State ex rel. Wickham v. Nygaard,* 396

Reassessment: Collecting cost from taxing district.

15. Sec. 1087—55, Stats., providing that the cost of a reassessment made by order of the tax commission shall be collected from the assessment district in which the reassessment was made, and returned to the state, is valid. *State ex rel. Att'y Gen. v. Hammerlund,* 315

16. The cost of such a reassessment is not a state expense incurred for state purposes, but a local expense for local purposes, incurred through state agency in order to correct a violation by local officers of the law relating to assessments; hence the provision that the state be reimbursed by the district does not violate the constitutional requirement that the rule of taxation shall be uniform. Const. art. VIII, sec. 1. *Ibid.*

TAXPAYERS' ACTION. See ACTION. COSTS. TOWNS, 4, 8, 10.

TESTAMENTARY CAPACITY. See WILLS, 1–5.

TOWN ORDERS. See ACTION, 1–4. TOWNS, 4, 5, 10.

TOWNS.

Powers: Population, how determined.

1. Upon the question whether a town having therein one or more incorporated villages has a population of 500, so as to enable it, by vote of the electors, to exercise the powers of villages and village boards, as provided in sub. 13, sec. 776, Stats. 1913, the federal census is *prima facie* evidence of the population it discloses; but, in the absence of any statutory declaration on the subject, neither that nor any other existing census can be held conclusive when the fact is challenged. *Menasha W. W. Co. v. Winter,* 437

2. When the existence of the requisite population is put in issue, any evidence competent to establish the existence or nonexistence of the fact is admissible. *Ibid.*

3. The rule against the impeachment of official documents does not apply to a challenge, in such a case, of the correctness of the enumeration of a state or federal census. *Ibid.*

Town officers. See CERTIORARI. OFFICERS, 3–6. TOWNS, 11, 12.

Town orders: Validity: Taxpayers' action. See ACTION.

4. A judgment in a taxpayers' action cannot lawfully determine the validity of town orders not issued to nor held by any of the parties to the action, and the fact that the holders may be numerous or scattered cannot affect their right to be heard. *Menasha W. W. Co. v. Winter,* 437

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5. Error in a judgment in a taxpayers' action, in that it attempts to pass upon the validity of town orders held by persons not before the court, does not affect its validity in respect to orders held by the defendants in the action. *Ibid.*

6. A contract by town officers in excess of their powers, as one for work upon a highway having no legal existence, is void and cannot be validated by performance on the part of the contractor. *Ibid.*

7. Even if the doctrine of equitable estoppel could, under any circumstances, apply to such a case, there would be no ground therefor where the work was done upon premises which were never used for highway purposes, so that the town received no benefit therefrom. *Ibid.*

8. An action brought in September to restrain the payment of town orders issued under illegal contracts made in the preceding June, cannot be defeated on the ground of laches. *Ibid.*

9. Electors of a town cannot give away the money of the taxpayers, and an order based upon a vote of the electors allowing one of the supervisors $200 upon a claim of only $175, for loss of a horse, is void. *Ibid.*

Same: Itemizing and verifying claims: Refiling.

10. In a taxpayers' action to annul certain town orders, where the claims upon which the orders were issued were inadequately itemized or verified, the court, upon the trial, properly allowed the claims to be refiled, properly itemized and verified. *Menasha W. W. Co. v. Winter,* 437

Contracts between town and its officers: Validity.

11. Sec. 4549, Stats. 1913, which makes it an offense for any town officer to have, reserve, or acquire any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any "purchase or sale of any personal or real property or thing in action," or in any contract or bid relating thereto, applies as well to sales by such officer directly to the town as to sales made by other persons in which he has or acquires an interest; and all contracts in contravention of the statute are absolutely void. *Menasha W. W. Co. v. Winter,* 437

12. Said statute, being highly penal, must be strictly construed, and cannot be held to prohibit contracts for personal services. *Ibid.*

Contracts: Authority. See ESTOPPEL, 2. TOWNS, 6.

13. A town has no power to pay a debt of a poor person for house rent, or any other debt of such a person, which was not lawfully incurred on the credit of the town. *Menasha W. W. Co. v. Winter,* 437

14. A claim for damages to a ladder, though small in amount, must be passed upon by the electors before the town board has authority to pay it. *Ibid.*

15. A town has no authority to expend money for street lighting, and a purchase by the town board for that purpose is *ultra vires* and void. *Ibid.*

Same: Purchases: Excessive delivery: Ratification.

16. Where a merchant supplies goods to a poor person in excess of the amount authorized by the town supervisors, but in good faith

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upon the credit of the town, the town board may afterward, by ratification, validate such excess. *Menasha W. W. Co. v. Winter*, 437

TRACTION ENGINES. See NEGLIGENCE, 8–12.

TRESPASS. See EJECTMENT, 1. NEGLIGENCE, 1. RAILROADS, 11.

TRIAL.

Arguments and remarks of counsel.

1. Remarks of plaintiff's counsel in his argument to the jury, in which he commented upon the supposed intimate relations between defendant's claim agent and the woman's attorney in the criminal action, while containing personal abuse which cannot be approved, are *held* not to have been prejudicial. *Andrews v. United States C. Co.* 604

Reception of evidence. See APPEAL, 9. CARRIERS, 14. EVIDENCE. FRAUD, 2, 3, 5. INSTRUCTIONS TO JURY, 10. INSURANCE, 2, 10. LANDLORD AND TENANT, 8. LIBEL AND SLANDER, 5, 7, 8. NEGLIGENCE, 9. PARTNERSHIP, 2. RAILROADS, 8, 9. SEDUCTION, 2. STREET RAILWAYS, 1, 2. TOWNS, 2. TRIAL, 12.

Questions for jury. See CARRIERS, 5. INSTRUCTIONS TO JURY, 5. MASTER AND SERVANT, 1, 7. MUNICIPAL CORPORATIONS, 3. RAILROADS, 15. SALES, 5. STREET RAILWAYS, 3.

2. In submitting a case to the jury the trial court decides, as matter of law, that the evidence will warrant findings in plaintiff's favor of the facts essential to a recovery. *Gillett v. Flanner-Steger L. & L. Co.* 578

Same: Direction of verdict. See RAILROADS, 10.

Instructions to jury. See CARRIERS, 16, 17. FRAUD, 3, 4. HOMICIDE, 3, 4. INSTRUCTIONS TO JURY. LANDLORD AND TENANT, 9. LIBEL AND SLANDER, 4, 11. NEGLIGENCE, 12. SEDUCTION, 3.

Same: Requests for instructions. See INSTRUCTIONS TO JURY, 2.

Same: Mistake in charge: Correction.

3. Before the jury returns its verdict the court may properly call it back to correct an erroneous charge. *Peterson v. Lemke*, 353
4. If the trial court was mistaken in stating to the jury that it was agreed by counsel that there was no evidence that the accident in question occurred otherwise than in one of two ways, it was counsel's duty to call attention to the mistake at once, so that it could be corrected. *Dishmaker v. Heck*, 572
5. Where, in such case, there was in fact no evidence that the accident occurred otherwise than as stated, it was immaterial whether there had been an agreement between counsel to that effect or not. *Ibid.*

Communications between court and jury.

6. All communications between the court and the jury should be in the open court room and free from any suspicion of secrecy. But where the jury, after retiring, were unable to decipher a word in the special verdict, and the foreman, returning into open court, asked the meaning of the word, to which the trial judge replied, "punitive, by way of punishment,"—the proceedings being taken down by the official reporter,—there was no prejudicial error. *Dishmaker v. Heck*, 572

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Verdict: Impeachment: Affidavits of jurors.

7. Affidavits of jurymen to the effect that after the foreman returned to the jury room and announced that the word was "punitive" there was discussion as to what would become of the punitive damages if any were awarded, the foreman and others contending that they would be paid to the county, and that, although the foreman did not represent that the court had given him any instructions on the subject, some of the jurymen believed that he was stating what the judge had told him, and that they would not have awarded punitive damages if they had known that such damages would go to plaintiff—were not admissible to impeach the verdict. *Dishmaker v. Heck,* 572

Special verdict. See FRAUD, 5, 6. STREET RAILWAYS, 2.

8. Where there are several material controverted issues raised by the pleadings it is error to deny a seasonable request for a special verdict. *Klas v. Kuehl,* 561

9. A request by defendant for a special verdict, made before he has introduced any evidence, is seasonably made under sec. 2858, Stats. *Ibid.*

10. An admission, in the nature of a concession for the purpose of narrowing the issues, made by defendant before demanding a special verdict was not the introduction of evidence on his behalf within the meaning of sec. 2858, Stats. *Ibid.*

11. Error in refusing to submit a special verdict cannot, upon the record in this case, be said to have been nonprejudicial. *Ibid.*

Trial by the court: Refusal to consider incompetent evidence.

12. In an equity case, after incompetent testimony had been admitted, it was entirely proper for the court to announce that it would not consider such testimony and to refuse to receive further evidence of like character. *Murphy v. Baldwin,* 567

13. A finding in this case that defendant did not promise to give plaintiff security for his indorsement of defendant's note is *held* to be sustained by the evidence. *Ibid.*

TRUST DEEDS. See MORTGAGES, 1.

ULTRA VIRES. See ESTOPPEL, 2. TOWNS, 6, 9, 11, 13, 15, 16.

USE OF SCHOOL BUILDINGS. See SCHOOLS AND SCHOOL DISTRICTS, 4.

VENDOR AND PURCHASER OF LAND.

Construction of contract. See BROKERS, 2.

1. Where, in a contract of sale, land is represented as being "plow land," that means that it is tillable land, not arid land which might be plowed without any beneficial results. *Govier v. Brechler,* 157

2. The words "close to a railroad" in a land contract must ordinarily be understood relatively to local conditions. *It seems* that land in North Dakota sixteen miles from a railroad is not within the meaning of the words. *Ibid.*

VERDICT. See RAILROADS, 10. TRIAL, 7–11.

WAIVER. See CORPORATIONS, 5, 8. ESTOPPEL, 4. GUARANTY, 5. INSURANCE, 8, 9. RAILROADS, 17. RELEASE.

WARNING SERVANT. See MASTER AND SERVANT, 2, 3.

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WARRANTY. See PLEADING, 2. SALES, 3–5.
WATERS AND WATERCOURSES. See RAILROADS, 6–9.

WILLS.

Testamentary capacity.

1. The clear preponderance of the evidence in this case is *held* to show, contrary to the findings of the county and circuit courts, that a testatrix had testamentary capacity at the time of making her will. *Estate of Bean: Cowan v. Bean,* 67
2. The opinions of physicians as to the mental competency of a testatrix are of little probative force where they are based upon the facts assumed in a hypothetical question from which all the matters and evidence relied upon by the proponent were excluded. *Ibid.*
3. Findings to the effect that a will was signed and duly executed by the testatrix, that she had testamentary capacity, and that it was not the result of undue influence, are *held* to be supported by the evidence. *Will of Morse: Balsinger v. Schrunk,* 188

Same: Effect of appointment of guardian.

4. Where the appointment of a guardian for an aged person was sought because of physical and not mental disabilities, and the evidence taken in that proceeding shows that no guardian should have been appointed, the appointment is of no evidentiary force or weight upon the question of the testamentary capacity of such person. *Estate of Bean: Cowan v. Bean,* 67
5. Sec. 3979, Stats.,—providing that the petition and order for notice in guardianship proceedings may be filed and recorded, and if a guardian is appointed all contracts except for necessaries and all *gifts*, sales, and transfers of property by the incompetent after such filing shall be void,—does not apply to wills or legacies provided for in wills. *Ibid.*

Probate: Contest: Attorneys' fees.

6. Under sec. 4041*b*, Stats., the supreme court may, in a contest as to the probate of a will, fix the amount to be allowed as attorneys' fees for work done in that court. *Estate of Bean: Cowan v. Bean,* 67

WITNESSES.
Competency: Transactions with decedents. See HUSBAND AND WIFE, 10.
Credibility. See INSURANCE, 10. RAILROADS, 14.

WORDS AND PHRASES.
Allowed, in lease. See LANDLORD AND TENANT, 7.
Any person dissatisfied, in statute. See TAXATION, 14.
Being a defaulter, in constitution. See OFFICERS, 6.
Clear proceeds of all fines, in constitution. See CONSTITUTIONAL LAW, 3.
Close to a railroad, in contract. See VENDOR AND PURCHASER, 2.
Condition, in lease. See LANDLORD AND TENANT, 1.
Conditional privilege. See LIBEL AND SLANDER, 9.
Contributory negligence, in statute. See RAILROADS, 12.
Delivery. See CARRIERS, 6.
Diminish the compensation of a public officer, in constitution. See CONSTITUTIONAL LAW, 13.
Employed in interstate commerce, in statute. See RAILROADS, 16.
Freedom of speech, in constitution. See CONSTITUTIONAL LAW, 16.

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Fruit, in lease. See LANDLORD AND TENANT, 10.
Full, in rule relating to car service. See CARRIERS, 18.
Gifts, in statute. See WILLS, 5.
Income, in constitution and statute. See CONSTITUTIONAL LAW, 11. TAXATION, 6.
Increase of stock, in lease. See LANDLORD AND TENANT, 11.
Interest, in statute. See JUDGES.
Interstate commerce. See CARRIERS, 10. CORPORATIONS, 10. RAILROADS, 16.
Judgment of a competent court, in statute. See ADVERSE POSSESSION, 1.
Jury trial, in constitution. See CONSTITUTIONAL LAW, 19.
Losses, in statute. See TAXATION, 8.
Necessarily used in operating the railroad, in statute. See TAXATION, 3.
Necessary, in statute. See TAXATION, 3.
Notice of injury, in statute. See LIMITATION OF ACTIONS, 1.
Obtain justice freely, in constitution. See CONSTITUTIONAL LAW, 21.
Other purpose, in statute. See HOMICIDE, 2.
Pecuniary provision, in statute. See HUSBAND AND WIFE, 6.
Performing services growing out of and incidental to his employment. See WORKMEN'S COMPENSATION ACT, 7.
Plow land, in contract. See VENDOR AND PURCHASER, 1.
Received in apparent good order, in bill of lading. See CARRIERS, 15.
Removal. See OFFICERS, 9.
Residing out of this state, in statute. See DOWER.
Stockholder, in statute. See CORPORATIONS, 7.
Suspension. See OFFICERS, 9.
Utmost resistance. See RAPE, 2.
Without or in excess of its powers, in statute. See WORKMEN'S COMPENSATION ACT, 2.
Written instrument as being a conveyance, in statute. See ADVERSE POSSESSION, 2.

WORKMEN'S COMPENSATION ACT.

What injuries compensated: Lightning stroke.

1. Injuries to employees for which compensation is to be paid under the Workmen's Compensation Act (secs. 2394—1 to 2394—31, Stats. 1913) are such as are incidental to and grow out of the employment. They do not include an injury caused by lightning where the exposure to the hazard from lightning stroke was not peculiar to the industry or rendered exceptionally great by the employment. *Hoenig v. Industrial Comm.* 646

Industrial commission: Orders: Conclusiveness.

2. An order of the industrial commission will not be *held* to have been "in excess of its powers," on the ground that there was no evidence to sustain it, unless there was an entire lack of relevant evidence tending to support the ultimate conclusion of fact upon which the order is based. *Oldenberg v. Industrial Comm.* 333
3. Findings by the industrial commission in this case that an employee had been fully compensated by his employer for all loss of wage resulting from certain injuries, and that at the time the payment of compensation ceased and he signed a release he had recovered from the effects of the injuries so that he was able to return to work without further loss of wages because of said injuries, are *held* to have support in the evidence. *Ibid.*

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